IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KIM SHUMATE, individually and as personal representative of the heirs and estate of HERBERT EUGENE FLICKINGER, decedent,

Plaintiff,

vs.

GAF CORPORATION, ARMSTRONG WORLD INDUSTRIES, AND OWENS-CORNING FIBERGLAS,

Defendants.

No. 90-C-260-C

JUDGMENT

This matter came before the Court for consideration of defendant, GAF Corporation's, motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for GAF Corporation, and against Plaintiff, Kim Shumate.

IT IS SO ORDERED this 19th day of December, 1994.

H. DALE COOK
United States District Judge

42

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KIM SHUMATE, individually and as personal representative of the heirs and estate of HERBERT EUGENE FLICKINGER, decedent,

Plaintiff,

vs.

GAF CORPORATION, ARMSTRONG WORLD INDUSTRIES, AND OWENS-CORNING FIBERGLAS,

Defendants.

No. 90-C-260-C

ORDER

Before the Court is the motion for summary judgment brought by defendant, GAF Corporation. At the pretrial conference held on December 19, 1994, counsel for plaintiff and defendant GAF Corporation advised the Court that there is no dispute as to the following material facts.

1. The decedent, Herbert Flickinger, worked as an electrician at various commercial job sites from 1953 through 1973.

2. GAF Corporation and its predecessors were producing and distributing asbestos containing products during this time frame. In particular, GAF Corporation was producing and distributing asbestos containing insulation and pipe covering products commonly used by insulators and others on commercial job sites.

3. The Ruberoid Company is a predecessor company of defendant, GAF Corporation. Ruberoid Company produced and distributed "7M" asbestos products that were manufactured from time to time at Hyde Park, Vermont.

4. The decedent, Herbert Flickinger, worked as an electrician in or around Southern Illinois University located in Carbondale, Illinois, in the late 50's through the early 70's. The decedent, Herbert Flickinger, worked at the Student Center at Southern Illinois Univeristy alongside other trade craft workers in 1968 through 1970.

5. Plaintiff's witness, James J. Willey, testified by deposition that he was employed as an insulator. Mr. Willey worked as an insulator in the Student Center at Southern Illinois Univeristy for a period of three to four months sometime during 1968. Mr. Willey could not identify whether the decedent, Herbert Flickinger, was at the Student Center when he was there, but Mr. Willey recalled that electricians, as well as all other trade craft workers were working at the Student Center at Southern Illinois University when Mr. Willey was there. Mr. Willey testified that he used products marked "7M," "Quik Set" and "Blue Mud" which created dust in the atmosphere. Mr. Willey testified that the dusty atmosphere was inhaled by all members of the trade craft workers that were in the locale in which Mr. Willey was working.

6. Plaintiff's witness, Dwight Pugh, testified by deposition that he was a carpenter. Mr. Pugh worked as a carpenter in the Student Center at Southern Illinois University for six to seven months during the relevant time period 1968 through 1970. Mr. Pugh identified the decedent, Herbert Flickinger, as also being at the Student Center sometime during this time. Mr. Pugh identified products called "Gold Bond" plaster and "Red Top" plaster as being used at this time by the plasterers in the Student Center. Mr. Pugh testified that the decedent and other trade craft workers were exposed to the dust created by "Gold Bond" and "Red Top" plaster and used at the Student Center at this time. There

is no evidence that GAF Corporation manufactured "Gold Bond" or "Red Top" plaster. The only product in dispute is referred to as "7M."

7. "7M" is not a brand name of an asbestos product. "7M", as it relates to insulation cements, refers to the length of asbestos fibers as graded under the standard Quebec Test. At least three other corporations other than GAF Corporation manufactured "7M" asbestos cement, including Philip Carey Company, Mundet Cork Company and Johns-Manville Corporation.

8. Plaintiff's product identification witness, Mr. Willey, did not mention or identify GAF Corporation as the manufacturer of the "7M" asbestos cement that he identified as being used in the Student Center at Southern Illinois University. However, Mr. Willey did specifically recall and identify Philip Carey as a brand name that he remembered.

9. Plaintiff's Exhibit 5 is a photograph of a "7M" asbestos cement bag with the name "Ruberoid Company" appearing on the bag. However, this photograph was not shown to Mr. Willey during this deposition, nor identified by Mr. Willey.

The following law is applicable to a proper consideration and determination of defendant's motion for summary judgment.

In order to overcome a motion for summary judgment, a plaintiff must make a sufficient showing of evidence as to each essential element of plaintiff's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Specifically the Supreme Court stated,

> [T]he plain language of Rule 56(c) [F.R.Cv.P] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id.

Moreover, a "complete failure of proof concerning an essential element of the nonmoving

party's case necessarily renders all other facts immaterial." Id. at 323. The essential elements of plaintiff's claim against defendant GAF Corporation which are necessary to establish a claim of products liability, include that (1) a defect existed in the product, (2) which created unreasonable danger to the decedent and (3) caused injury to the decedent. Dillon v. Fibreboard Corporation, 919 F.2d 1488, 1490 (10th Cir.1990). A plaintiff in an Oklahoma asbestos products liability case "must prove that the product was the cause of injury." Id. at 1491. Thus, product identification is an essential element.

In Oklahoma a plaintiff must come forth with some evidence that the defendant's product caused the injury. "The mere possibility that it might have caused the injury is not enough." Id. "This causative link must be established through circumstances which would insure that there was a significant probability that the defendant's acts were related to the plaintiff's injury." Id. To satisfy "a reasonable inference of significant probability of a causative link between plaintiff's injuries and the defendant's product, there must evidence of decedent's exposure to a specific product on a regular basis over some extended period of time in proximity to where the decedent actually worked." Id.

A non-moving party must set forth specific facts showing that there is a genuine issue for trial as to each element. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 1490.

In overcoming a motion for summary judgment, the plaintiff has the burden of designating "specific facts showing that there is a genuine issue for trial." Circumstantial evidence is sufficient if it raises a disputed fact.

In this case, plaintiff's personal representative has failed to offer any evidence of a significant probability that the product manufactured by GAF Corporation was used during the time frame in question at the job site in which plaintiff is shown to have worked as an electrician, i.e. the Student Center at Southern Illinois University. Plaintiff's product identification witness, James Willey, could not identify any manufacturer's brand name other than Philip Carey. It is undisputed that Philip Carey manufacturers "7M" asbestos products. Moreover, Mr. Willey could not identify the decedent as being at the Student Center. Although plaintiff's witness, James Pugh, could recall the decedent's presence at the Student Center during this time frame, Mr. Pugh identified only asbestos containing products which were not manufactured by GAF Corporation.

There being a complete failure of evidence in the record to show that the decedent, Herbert Flinkinger, was ever exposed to asbestos products manufactured by GAF Corporation, the Court finds and concludes that the defendant GAF Corporation is entitled to summary judgment.

IT IS THEREFORE THE ORDER OF THE COURT, that the motion for summary judgment brought by the defendant, GAF Corporation, against the plaintiff, Kim Shumate, is hereby GRANTED.

IT IS SO ORDERED this 19th day of December, 1994.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

RASKIN RESOURCES, INC.

Debtor,

RASKIN RESOURCES, INC.,

Plaintiff,

vs.

ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation,

Defendant and Third Party Plaintiff

v.

CURTIS CRANE CORPORATION, a suspended Oklahoma corporation, d/b/a CHARLIES CRANE SERVICE and GAUGER ENGINEERING COMPANY, a sole proprietorship,

Third Party Defendants.

No. 94-C-452-K

O R D E R

On May 2nd, 1994, Rockwell International ("Rockwell") filed its Demand for Jury Trial and Motion to Withdraw Reference. The Motion for Withdrawal of Reference devolves upon the Movant without choice. The Tenth Circuit has conclusively determined that jury trials related to bankruptcy must occur in the District Court. In re Kaiser Steel Corp., 911 F.2d 380 (10th Cir. 1990).

In its effort to prevent the withdrawal of reference, Raskin Resources, Inc. ("Raskin Resources") has made two chief arguments. First, Raskin asserts that Rockwell is procedurally barred because

15

it filed out of time its request for jury trial and withdrawal of reference. Second, Raskin Resources has made the legal argument that Rockwell has already submitted itself to the jurisdiction of the Bankruptcy Court and may not receive a jury trial in the District Court.

In making its procedural argument, Raskin Resources relies on Rule B-6 of the District Court Rules for Bankruptcy Practice and Procedure to argue that Rockwell's demand for jury trial is untimely. On the other hand, Rockwell relies on Local Rule Misc. 173, issued by the Bankruptcy Court in January of 1994, to argue that its appeal is timely. Indeed, the rules are clearly in conflict in this case. It is clear that if Rule B-6 applies, Rockwell's Motion for Jury Trial is out of time.[1] It is just as clear that pursuant to Misc. Rule 173, the Motion for Jury Trial was made in a timely fashion.[2]

This Court need not resolve the conflict between these two rules at this particular point. Rather, Raskin Resources' alternative basis for denial is persuasive and thereby makes moot the conflict between the two procedural rules.

In its second objection to the Motion for Jury Trial and Withdrawal of Reference, Raskin Resources states that Rockwell has waived a jury trial by asserting counterclaims against Raskin

---

[1]Rule B-6 requires "transfer" motions to be filed within twenty days from time movant has entered appearance or been served with summons or notice.

[2]Misc. Rule 173 allows a party to demand trial by jury on an issue as long as demand is made in writing no later than ten days after service of the last pleading regarding that issue.

Resources, thereby submitting itself to the jurisdiction of the Bankruptcy Court. See Katchen v. Landy, 382 U.S. 323 (1966).

In order to assess this claim adequately, it is first necessary to reconstruct the main facts of the dispute here at issue. Originally, Raskin Resources claimed that Rockwell, who had been a tenant in a building owned by Raskin Resources or its predecessor from 1982 until June of 1993, breached the lease between the parties in several respects. The Complaint by Raskin Resources against Rockwell was filed in the Bankruptcy Court for the Northern District on January 20, 1994. In response, Rockwell filed a document in the Bankruptcy Court titled "Answer, Counterclaims and Third Party Complaint" on April 25, 1994. Rockwell counterclaimed that Raskin Resources had breached the lease, that Raskin Resources' leasing of the building to Rockwell constituted negligence on the part of the landlord, and that Raskin Resources consented to damage done to the property or was negligent in not preventing damage to the property.

The question at issue is whether the assertion of these counterclaims constituted submission to the jurisdiction of the Bankruptcy Court and waiver of the Seventh Amendment right to a jury. In Langenkamp v. Culp, 498 U.S. 42, 44 (1990), the Supreme Court squarely held that the filing of a claim against a bankruptcy estate triggers the process of allowance and disallowance of claims, thereby subjecting oneself to the bankruptcy court's equitable power. The general principle in Langenkamp guides this Court in the present dispute.

Rockwell has argued that its claim was compulsory under Rule 7013 of the Bankruptcy Rules and Rule 13 of the Federal Rules of Civil Procedure, since it would lose its counterclaim if it did not make it in the Answer. The compulsory nature of the counterclaim, Rockwell hopes, will make the Court less likely to deprive Rockwell of a jury trial. However, a closer look at Rule 7013 reflects that Rockwell's counterclaim was permissive, not compulsory. Bankruptcy Rule 7013 provides:

> Rule 13 F.R.Civ.P. applies in adversary proceedings, except that a party sued by a trustee or debtor in possession need not state as a counterclaim any claim that the party has against the debtor, the debtor's property, or the estate, unless the claim arose after the entry of an order for relief. . . .

According to Rule 7013 of the Bankruptcy Code, Rule 13 of the Federal Rules of Civil Procedure applies only when claims arise after the entry of an order for relief.[3] In the Bankruptcy Court action, Rockwell asserted counterclaims that involved a lease entered into by Rockwell with the Raskins in 1982. Rockwell counterclaimed that Raskin Resources had breached the lease, leased in a negligent manner, consented to damage done to the property, or was negligent in not preventing damage to the property.[4] In a

---

[3]Fed.R.Civ.P. 13(a) requires a pleading to state a counterclaim against an opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Rule 13(f) allows a pleader, by leave of court, to set up the counterclaim if the pleader failed to include the counterclaim due to oversight, inadvertence, or excusable neglect.

[4]The first count alleges that Raskin Resources failed to repair a roof that began to leak in 1990. The second count alleges that the original decision to lease the building to Rockwell in 1982 was negligent in light of the activities Rockwell intended to perform in the structure. Finally, Rockwell alleges that Howard Raskin

voluntary chapter 11 case, the commencement of the action is equivalent to an order for relief. 11 U.S.C. § 301. Clearly, the counterclaims at issue in this dispute arose before the filing of bankruptcy by Raskin Resources in January of 1993. Therefore, Rockwell's counterclaim was permissive, since it was not required to file the counterclaim or lose it forever.

This same result was reached in Bayless v. Crabtree, 108 B.R. 299 (W.D. Okla. 1989), aff'd., 930 F.2d 32 (10th Cir. 1991); See also Peachtree Lane Associates, Ltd. v. Granader, No. 94 C 5588, 1994 WL 675127 (N.D. Ill. Nov. 29, 1994). In Bayless, the court found that the filing of a counterclaim constituted waiver of a jury trial. Moreover, the court also rejected the argument that Rule 7013 turned a counterclaim into a compulsory act. Raskin Resources attempts to distinguish Bayless by highlighting that in this case, the defendants are neither creditors nor in possession of listed assets. However, a "creditor" is defined in 11 U.S.C. § 101(10) as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." In turn, a "claim" is defined broadly to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent. . . ." Pursuant to these definitions, Rockwell has a claim and is a creditor under the bankruptcy statutes.

The Tenth Circuit has adopted broad language in upholding the

---

negligently inspected the building throughout Rockwell's eleven-year tenancy.

District Court decision in Bayless v. Crabtree. The Tenth Circuit stated:

> The Crabtree children have consented to the bankruptcy court's jurisdiction by filing counter and cross-claims. In Katchen v. Landy, the Supreme Court stated that once a party presents a claim to the bankruptcy court, it submits to that court's jurisdiction. Although the Crabtree children did not file a proof of claim, they nonetheless injected their property claims into the bankruptcy proceedings by voluntarily filing counter and cross-claims asserting title.

No. CIV-89-1337-A, 1991 WL 50166, at *1 (10th Cir. April 2, 1991).

Finally, Rockwell argues that its counterclaim is outside the debtor's bankruptcy estate proceedings and therefore is not part of a "debtor/creditor" relationship. However, there is no such test used in the Tenth Circuit to determine jury waiver. Instead, the Supreme Court held in Katchen v. Landy simply that a party to a suit who has either filed a claim in the bankruptcy case or presented counterclaims in an adversary proceeding brought by a bankrupt debtor has waived the right to a jury trial. The effectiveness of this principal was reemphasized in Granfinanciera, S.A. v. Norberg, 492 U.S. 33, n. 14 (1989) and remains the guiding principle to resolve this dispute.

In light of the fact that Rockwell asserted permissive counterclaims in bankruptcy court, it thereby waived its right to a jury trial. Therefore, the Demand for Jury Trial and Withdrawal of Reference is denied.

ORDERED this 19 day of December, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHRYN A. VALOT,

Plaintiff,

vs.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 91-C-961-K

O R D E R

Before the Court is the appeal of Kathryn A. Valot ("Plaintiff") to the Secretary's denial of disability benefits. Her appeal is made pursuant to 42 U.S.C. § 405(g).

Plaintiff filed an application for Social Security Disability Insurance benefits in January of 1987, alleging an onset disability date of October 30, 1986. (Tr. 87-90). A technical denial was issued because she was last insured as of March 31, 1985 and was thus ineligible for disability benefits subsequent to that date. (Tr. 11). Subsequently, in her February 1989 application, Plaintiff alleged a new onset date of October 31, 1984. (Tr. 92-95). After her claim was denied, she received a hearing before an administrative law judge ("ALJ") on October 17, 1990. The ALJ determined that Ms. Valot was not disabled within the meaning of Title II of the Social Security Act by March 31, 1985, but was disabled by December 20, 1988 for the purposes of Supplemental Security Income under Title XVI of the Act. After the Appeals

14

Council denied review of the February 1989 application, the decision of the Secretary became final, and Plaintiff timely appealed the denial of benefits.

The relevant period for purposes of this Court's review ranges from her alleged onset date of October 31, 1984 and the time of the expiration of her insured status, March 31, 1985. The Plaintiff must be able to show she became disabled on or before the expiration of her insured status. 42 U.S.C. §423(a)(1); 20 C.F.R. §404.131(b). Therefore, the medical records of this period will constitute the heart of this Court's inquiry.

Plaintiff first argues that the ALJ constructively reopened the administrative determination that involved her 1987 application for disability benefits. However, the ALJ specifically refused to reassess the earlier application and only dealt with times not covered by the 1987 application. The ALJ only assessed Plaintiff's claims for disability benefits from October of 1984 to March of 1985 and claims for Supplemental Security Income on December 20, 1988. These time frames were not addressed in the earlier application for benefits. Therefore that application cannot be said to have been reopened here.[1]

The Secretary must follow a five-step process in evaluating a

---

[1]Absent any colorable constitutional claim and without an evidentiary hearing on a request to reopen, federal courts lack jurisdiction to review a decision by the Secretary not to reopen a previous claim for benefits. Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); Cottrell v. Sullivan, 987 F.2d 342 (6th Cir. 1992); Kasey v. Sullivan, 3 F.3d 75 (4th Cir. 1993). No evidence has been presented to even suggest a viable constitutional claim that would require this Court to reopen the 1987 application.

claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2 A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988). The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). If the inquiry proceeds to the fifth step, the government bears the burden of showing that a claimant can perform other work.

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere

scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Plaintiff was born on July 8, 1943 and has a twelfth grade education. She has had much psychological treatment and has undergone several surgical procedures. She sustained an on-the-job injury to her back and neck in 1980 and was involved in an auto accident in 1970. Her previous employment includes working as a tune-up mechanic for Sears in 1976 and as a masseuse from 1982 to November 1984. She also has been a waitress, a delivery driver, a mat finisher, a crate/box maker, a receptionist, and a bills of lading clerk for an equipment company. (Tr. 48-54). She is currently diagnosed with the painful ailment of fibromyalgia. Fibromyalgia is evidenced by tender points over multiple areas of one's body. By definition, pain must be present in at least 11 of 18 body regions. Plaintiff has been diagnosed with 15 tender points that elicit pain. (Tr. 29-30).

In reviewing the evidence, the ALJ found that Plaintiff had not worked since the newly alleged onset date of October 30, 1984

and was insured for purposes of Title II of the Act until March 31, 1985. Although the ALJ found that her impairment of fibromyalgia was severe, it did not meet or equal a listed impairment. (Tr. 12). These conclusions have not been contested by the Plaintiff. At the fourth step, the ALJ determined that Plaintiff retained the ability to do sedentary work, but her past work required medium and light exertion. Therefore, the ALJ proceeded to the fifth step of the evaluation and determined through the use of a vocational expert that a substantial number of jobs were regionally and nationally available which Plaintiff could perform. Thus, the ALJ found the evidence showed Plaintiff was not disabled under the Social Security Act.

Examination of the Record during the relevant time reveals that Plaintiff suffered no severe functional limitations between the time of her alleged onset date, October 31, 1984, and the time of the expiration of her insured status, March 31, 1985. In her brief, Plaintiff alleges that the evidence shows "she was treated for chronic severe pain and a mental disorder for years." Pl.'s Brief, at p. 5. However, there is very little specific evidence of disabling impairment. Although Plaintiff said her onset date was October 31, 1984, the medical notes taken on that date and in that period show no abnormal medical findings. Instead, she continued to receive relatively mild forms of treatment such as hot packs, pelvic traction, ultrasound, and massage. (Tr. 355, 358) In fact, she reported that her pain was decreasing on November 5, 1984.

Between the time of claimant's alleged onset date, October 31,

1984, and the time of the expiration of her insured status, March 31, 1985, the Record revealed: no evidence of disk disease; normal straight leg raises; and intact deep tendon reflexes. (Tr. 284) She experienced severe low back pain radiating into right leg, but the deep tendon reflexes were normal with no obvious muscle wasting. (Tr. 285). There was no significant narrowing of disk spaces, no spondylolisthesis or spondylosis, no evidence of fractures, dislocations or other significant abnormalities. (Tr. 287). X-rays taken in late November 1984 were negative for disk herniation and nerve root amputation with minimal posterior disk bulging at L4-5 level. (Tr. 295, 299, 362-363).

Progress notes completed by City of Faith Medical and Research Center during the relevant time indicate that Ms. Valot received a series of diagnostic tests. She was referred for Home Health Care but was rejected and considered "inappropriate ... as she is not homebound." (Tr. 301-302). Follow-up visits do not reveal any remarkable nerve conduction or dysfunction. (Tr. 353). Exercises and hot pack treatments along with medication were prescribed and continued through February 1985. (Tr. 338).

Doctors at the City of Faith Medical and Research Center monitored her health from 1984 through 1985. A consultation with Dr. Ronald Woosley, M.D. in December 1984 confirmed back and bilateral leg pain but the CT scan, myelogram and routine lab work were "all ultimately within normal limits except for mild bulging disk at L4-5 without nerve root irritation." (Tr. 290). He also concluded that there was no atrophy or fasisiculation, and that she

was able to walk without difficulty. The ALJ noted that she was also seen on January 7, 1985 by Dr. Woosley whose notes reveal that her EMG showed some L-5 nerve root dysfunction, but the study was unremarkable. Nevertheless, she was placed in the hospital for bedrest with physical therapy twice daily. Two weeks later, Dr. Woosley noted that Valium improved her condition. After further examination, he diagnosed musculoskeletal pain and prescribed physical therapy. A nerve conduction study revealed findings within normal levels. Progress notes in early 1985 by Dr. Woosley indicated claimant was "being fairly active as far as exercise is concerned" and improving on Valium, Talwin and Robaxim. (Tr. 351-352). Interestingly, Plaintiff stated as late as December of 1984 that she was exercising with a Jane Fonda aerobic exercise tape. (Tr. 325). None of the doctors indicated that claimant's impairment or combination of impairments were so severe as to render her incapable of performing any type of work during the relevant time period.

In addition, the Court concurs with the ALJ's evaluation of Plaintiff's subjective allegations of disabling pain. Consideration was given to the fact that Plaintiff filed her first application for disability and claimed she was disabled due to severe debilitating pain as of October 31, 1986. However, Ms. Valot's second application was for a period of disability with an earlier onset date of October 31, 1984. The medical record does not corroborate this earlier onset date.

Given these inconsistencies, the ALJ questioned Plaintiff's

subjective complaint that she was disabled as of October 31, 1984. The ALJ is authorized to assess credibility and "decide whether he believes the claimant's assertions of severe pain." Williams v. Bowen, 844 F.2d 748, 754 (10th Cir. 1988) quoting Luna v. Bowen, 834 F.2d at 163. Special deference is generally afforded a trier of fact who makes a credibility finding. Williams, 844 F.2d at 755. Taking into consideration Plaintiff's subjective complaints, the inconsistencies in her testimony at the hearing, and his personal observations, the ALJ concluded that her subjective complaints were not credible. (Tr. 14). A claimant's descriptions, alone, are not enough to establish a physical or mental impairment. 20 C.F.R. §404.1528(a). Thus, the Record supports the ALJ's finding that as of March 31, 1985, the claimant's subjective allegations of disabling pain were not credible.

The Plaintiff relies mainly on medical testimony and reports from Dr. Kenneth Graham, D.O., and Harold Goldman, M.D. However, their testimony often did not involve the relevant time period and frequently undermined Plaintiff's allegation of disability. Dr. Graham established that Plaintiff suffers from the pain-producing impairment of fibromyalgia. Although Dr. Graham had lost track of Plaintiff for much of the relevant time period, his notes reveal he has treated Plaintiff since approximately 1982 for moderate depression and fibromyalgia. He testified that treatment has helped some, but the disease gets better and worse on its own. He also indicated that when he first saw Plaintiff the pain was localized, and the disease was not yet developed. (Tr. 36). In

notes from October of 1984, he stated that straight leg raises were negative and deep tendon reflexes were intact. (Tr. 284). He also indicates that he instructed the Plaintiff she could return to work immediately. (Tr. 284). Overall, Graham says he mainly has offered "emotional support" because of her sexually abusive childhood. He testified that plaintiff is "clearly not malingering, but she is manipulative." (Tr. 31).

Medical expert, Dr. Harold Goldman, testified mainly about Plaintiff's condition at the time of the hearing and thus is of little relevance. According to Dr. Goldman, fibromyalgia is really a "constellation of symptoms," occurring predominantly in females, characterized by trigger points and associated with depressive illness. Since it has no laboratory diagnostic functions, an objective diagnosis is impossible. Typically, there is no joint involvement, no muscle atrophy, no nerve deficit, only a "jump" reaction to tender or trigger points over various body regions. (Tr. 75). Since there were no demonstrable physical disabilities and no laboratory test to confirm Plaintiff's impairment, Dr. Goldman concluded that no listing met or equalled her impairment. (Tr. 77). Dr. Goldman also testified that the claimant appears to be having more pain recently than in the past. (Tr. 77).

Plaintiff also points to the medical report prepared by Dan Metcalf, M.D, who examined her during the relevant time period and found a 37.5% impairment. This medical report, however, is contradicted by the substantial evidence discussed above. Within a few weeks of Dr. Metcalf's examination, Dr. Reiff Brown, M.D.

examined the Plaintiff and stated that "the patient is [a] well developed, well nourished, white female in no acute distress. (Tr. 289) (emphasis added). Dr. Brown only found mild limitation of motion and concluded that the neurologic examination produced negative results.[2]

The ALJ generously found that Plaintiff suffered from a severe impairment and proceeded to Step 4 to evaluate Plaintiff's ability to perform past work in light of her residual functional capacity. See 20 C.F.R. §404.1546. Applying the procedures outlined in SSR 88-13, the ALJ considered Plaintiff's subjective allegations of disabling pain in relationship with the medically determinable physical and/or mental impairments that could reasonably be expected to produce the pain alleged. He determined that the record reflected no evidence that would suggest that Plaintiff was unable to perform the full range of sedentary work. This conclusion is buttressed by the Residual Functional Capacity Assessment completed in 1989. According to that assessment, made when the pain ailment had entered a more severe stage, Plaintiff still retained the ability to lift 50 pounds; frequently lift or carry 25 pounds; and stand, sit and/or walk a total of about 6 hours in an 8-hr. day. She was also capable of frequent climbing, balancing, kneeling, crouching and crawling and occasional

---

[2]From 1987 to present, there is an abundance of medical data substantiating that claimant's condition, both physically and emotionally, became progressively worse. As of December 20, 1988, claimant's subjective allegations were deemed credible by the ALJ. However, this finding does not entitle her to the disability benefits she desires from the period beginning in 1984 and ending in March of 1985.

stooping. In light of the ALJ's credibility finding for the relevant 1984-85 period and the medical evidence, the Court concludes there is sufficient evidence for the ALJ to have determined that claimant retained the residual functional capacity for the full range of sedentary work.[3]

Once step five is reached, the burden shifts to the Secretary to show that a claimant retains the capacity to perform alternative forms of work in the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990). The ALJ properly considered testimony from the vocational expert establishing a significant number of sedentary jobs both regionally and nationally that Plaintiff could have performed. The vocational expert stated that a person with the claimant's background would be able to find 160,000 jobs in the national economy as a receptionist and 20,000 regionally. She would find 87,000 positions as an order clerk in the national economy and 10,000 regionally. For positions such as cashier or parking lot attendant, she would find 615,000 positions in the national economy and 76,000 regionally. (Tr. 82).[4]

In conclusion, the Court finds there is sufficient evidence for

---

[3]Subsequently, Plaintiff's residual functional capacity was reduced by an inability to concentrate, persist or be in attendance on a sustained basis. However, this reduction took place as of December 20, 1988, but not during the time frame at issue here.

[4]It is unclear in the ALJ's decision whether these vocational estimates refer to the post-1988 period or to the period at issue in this case. This ambiguity has not been raised by the Plaintiff as a grounds for reversal. Moreover, the Record reflects a finding that Plaintiff could perform the full range of sedentary work. In light of the Record taken as a whole, this Court does not find it necessary to remand for clarification on this issue.

the ALJ to conclude that Plaintiff is not entitled to disability insurance benefits under the Social Security Act for the period between October 30, 1984 and March 31, 1985. Although Plaintiff may have been under a disability as of December 20, 1988, the Court upholds the ALJ's denial of benefits during the period at issue. The Secretary's decision is, therefore, AFFIRMED.

SO ORDERED this 16 day of December, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONALD LEE O'SHIELDS,)
)
Petitioner,)
)
vs.) No. 92-C-929-C
)
STEVE HARGETT, et al.,)
)
Respondents.)

ORDER

On November 8, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, Petitioner has not responded to the November 8, 1994 order. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 16th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT MAYFIELD JOHNSON,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 92-C-1096-K

ORDER

On November 16, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, Petitioner has not responded to the November 16, 1994 order. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 16 day of December, 1994.

Terry C Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Patrick Drake,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 94-C-904-K
	)	
General Signal Corp.,	)	
	)	
Defendant.	)	

O R D E R

Now before the Court is Plaintiff's Motion to Remand to State Court.

Defendant removed this case from the District Court of Creek County, Oklahoma to this Court on September 23, 1994 based upon diversity jurisdiction. On October 20, 1994, Plaintiff filed a Motion to Remand to State Court, alleging that the jurisdictional amount in controversy was not satisfied.

The parties agreed that Defendant General Signal would consent to the remand of this case to state court, without prejudice, in return for and subject to the stipulation of Plaintiff Patrick Drake not to seek damages in state court in excess of $50,000 and to waive costs and attorney fees resulting from removal and remand of this case.

The Plaintiff has so stipulated. Stip. of Patrick Drake, Def.'s Resp. to Pl.'s Mot. to Rem. The Defendant now consents to the remand subject to the stipulation, reserving the right to remove the dispute to federal court in the event the allegations, prayer for relief, and/or facts justify removal.

12

In light of the mutual desire of the parties for the action to be heard in state court, this Court hereby grants the Plaintiff's Motion to Remand, without prejudice, to the District Court of Creek County, Oklahoma.

ORDERED this 19 day of December, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LORI BLEVINS, an individual, LORI BLEVINS, next of friend JERRY DEAN BLEVINS, BRITTANY JEAN BLEVINS and HEATHER LORAINNE BLEVINS,	)	
Plaintiffs,	)	
vs.	)	Case No. 94 C-800-E
MAPCO AMMONIA PIPE LINE, INC., a Delaware Corporation,	)	
Defendant.	)	

NOTICE OF DISMISSAL

Comes now the Plaintiff's, by and through their attorney, Richard D. White, Jr., and dismiss the above captioned matter, without prejudice, before service has been obtained on the Defendant, in accordance with Rule 41 (a) (1) (i) of the Rules of Civil Procedure.

Richard D. White, Jr., OBA # 9549
111 W. 5th Street, Suite 510
Tulsa, OK 74103-4259
(918) 582-7888

RDW/klh

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAVID STEINSIEK,

Plaintiff,

vs.

SILO, INC., a Pennsylvania corporation, formerly a wholly-owned subsidiary of Dixon Group, P.L.C. and presently a wholly-owned subsidiary of Fretters, Inc.; FRETTERS, INC., a foreign corporation, d/b/a "YES" (Your Electronic Store), a wholly-owned subsidiary of Fretters, Inc. and RANDY USSERY, an individual and in his capacity as Store Manager,

Defendants.

DOCKET NO. 94-C 743 B

FILED
DEC 20 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Notice Of
DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff and, by agreement with the Defendant, agrees to dismiss without prejudice to refiling, the following defendants:

1. FRETTERS, INC., a foreign corporation, d/b/a "YES" (Your Electronic Store); and,

2. RANDY USSERY, in his individual capacity ONLY.

Additionally, the Plaintiff and Defendants listed above are in agreement that the motions of those Defendants to dismiss are moot at this time.

DATED this 20th day of December, 1994.

Respectfully submitted,

W. C. "BILL" SELLERS, INC.

Tom C. Lane

Tom C. Lane, Sr. OBA No. 12746
600 South Main Street
Post Office Box 1404
Sapulpa, Oklahoma 74067-1404
(918) 224-5357

Attorneys for the plaintiff,
DAVID STEINSIEK

ENTERED ON DOCK
DATE 12-20-94

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of December, 1994, I mailed a true and correct copy of the above and foregoing instrument with proper postage thereon fully prepaid to each of the following:

Kimberly Lambert Love
BOONE, SMITH, DAVIS, HURST & DICKMAN
Suite 500
100 W. 5th Street
Tulsa, Oklahoma 74103

Tom C. Lane

Tom C. Lane, Sr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Patrick Drake,

Plaintiff,

vs.

General Signal Corp.,

Defendant.

No. 94-C-904-K

O R D E R

Now before the Court is Plaintiff's Motion to Remand to State Court.

Defendant removed this case from the District Court of Creek County, Oklahoma to this Court on September 23, 1994 based upon diversity jurisdiction. On October 20, 1994, Plaintiff filed a Motion to Remand to State Court, alleging that the jurisdictional amount in controversy was not satisfied.

The parties agreed that Defendant General Signal would consent to the remand of this case to state court, without prejudice, in return for and subject to the stipulation of Plaintiff Patrick Drake not to seek damages in state court in excess of $50,000 and to waive costs and attorney fees resulting from removal and remand of this case.

The Plaintiff has so stipulated. Stip. of Patrick Drake, Def.'s Resp. to Pl.'s Mot. to Rem. The Defendant now consents to the remand subject to the stipulation, reserving the right to remove the dispute to federal court in the event the allegations, prayer for relief, and/or facts justify removal.

12

In light of the mutual desire of the parties for the action to be heard in state court, this Court hereby grants the Plaintiff's Motion to Remand, without prejudice, to the District Court of Creek County, Oklahoma.

ORDERED this 19 day of December, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 19 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GARY PAUL FISH,

Plaintiff,

vs.

OFFICER FRAZIER, et al

Defendants.

No. 94-C-679-BU

ENTERED ON DOCKET
DATE 12-20-94

ORDER

On November 17, 1994, the Court granted Plaintiff an extension of time to comply with this Court's July 18, 1994 order, and advised Plaintiff that his failure to comply with this order will result in the dismissal of this action. As of the date of this order, Plaintiff has failed to comply with the July 18, 1994 order. Accordingly, Plaintiff's complaint is hereby **dismissed** for lack of prosecution.

SO ORDERED THIS 19 day of Dec., 1994.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

8

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FIRST COLONY LIFE INSURANCE COMPANY, a Virginia corporation,	)	
Plaintiff,	)	
v.	)	Case No.: 94-C-470BU
CLAY T. ROBERTS, DODIE S. NOLAND, and DEBORAH SUE HUFFMAN,	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Having considered the Joint Stipulation for Dismissal with Prejudice, and for good cause shown,

IT IS HEREBY ORDERED the captioned action be and the same is hereby dismissed with prejudice.

DATED this 19 day of Dec, 1994.

MICHAEL BURRAGE
United States District Judge

mm

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 19 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TINA DUNN,

Plaintiff,

vs.

THORN AMERICAS, INC., d/b/a RENT-A-CENTER, INC., a Delaware Corporation,

Defendant.

Case No. 94-C-764-BU

ENTERED ON DOCKET

DATE 12-20-94

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 19 day of December, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RODNEY CHARLES MCCULLOUGH,)
)
Petitioner,)
)
vs.) No. 92-C-526-K
)
RON CHAMPION, et al.,)
)
Respondents.)

ORDER

On November 16, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, Petitioner has not responded to the November 16, 1994 order. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 16 day of December, 1994.

Terry C. Kern
TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRED PITTS,

Plaintiff,

vs.

RON CHAMPION,

Defendants.

No. 94-C-956-K

ORDER

At issue before the Court are Respondent's motion to dismiss for failure to exhaust state remedies and Petitioner's motion to dismiss his petition for a writ of habeas corpus without prejudice. In his motion, Petitioner concedes that he failed to exhaust state remedies and that he should be granted a dismissal without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's motion to dismiss ("to withdraw the writ," doc. #5) is **granted** and that the petition is **dismissed without prejudice.**

(2) Respondent's motion to dismiss (doc. #4) is **denied as moot.**

SO ORDERED THIS 15 day of December, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARNOLD DEAN HOLBROOK,

Plaintiff,

vs.

VINCE SMITH, et al.,

Defendants.

No. 94-C-1070-B

ORDER

Before the Court is Plaintiff's letter, received on December 8, 1994, advising the Court that he would like to dismiss the above captioned case. The Court will construe this letter as a motion to dismiss this action under Fed. R. Civ. P. 41 and will grant the same.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The Clerk shall **docket** Plaintiff's letter as a motion to dismiss voluntarily this action under Fed. R. Civ. P. 41.

(2) Plaintiff's motion to dismiss is **granted** and this case is **dismissed without prejudice**.

(3) Defendant Judge Oakes's motion to dismiss (doc. #4) is **denied as moot**.

SO ORDERED THIS 19th day of Dec., 1994.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

8

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT E. SNIDER; ANITA KATHLEEN McCASLIN SNIDER; DOENGES BROTHERS FORD, INC. aka DOENGES BROS. FORD, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

DEC 16 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 94-C 638K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 15 day of Dec., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Doenges Brothers Ford, Inc. aka Doenges Bros. Ford, Inc. appears by its attorney, M. E. McCollam; and the Defendants, **Robert E. Snider and Anita Kathleen McCaslin Snider**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Doenges Brothers Ford, Inc. aka Doenges Bros. Ford, Inc.**, waived service of Summons on June 27, 1994.

The Court further finds that the Defendants, **Robert E. Snider and Anita Kathleen McCaslin Snider**, were served by

publishing notice of this action in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 26, 1994, and continuing through October 31, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Robert E. Snider and Anita Kathleen McCaslin Snider**, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Robert E. Snider and Anita Kathleen McCaslin Snider**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or

last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma**, and **Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on July 26, 1994; that the Defendant, **Doenges Brothers Ford, Inc. aka Doenges Bros. Ford, Inc.**, filed its Answer on August 3, 1994; and that the Defendants, **Robert E. Snider and Anita Kathleen McCaslin Snider**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot One (1), Block One (1), PARK CITY ADDITION, a Resubdivision of part of Block 5 of BROADVIEW HEIGHTS ADDITION, to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on December 1, 1988, the Defendant, Robert E. Snider, executed and delivered to Commonwealth Mortgage Company of America, L.P., Limited Partnership his mortgage note in the amount of $32,697.00,

payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Robert E. Snider, executed and delivered to Commonwealth Mortgage Company of America, L.P. a mortgage dated December 1, 1988, covering the above-described property. Said mortgage was recorded on December 6, 1988, in Book 5144, Page 325, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 29, 1990, Commonwealth Mortgage Company of America, L.P., Limited Partnership assigned the above-described mortgage note and mortgage to The Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 13, 1990, in Book 5276, Page 2470, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1990, the Defendant, Robert E. Snider, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, Robert E. Snider, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Robert E. Snider**, is indebted to

the Plaintiff in the principal sum of $48,476.41, plus interest at the rate of 10 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $8.00 which became a lien on the property as of June 23, 1994; a lien in the amount of $8.00 which became a lien as of june 25, 1993; and a lien in the amount of $19.00 which became a lien as of June 26, 1992. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Doenges Brothers Ford, Inc. aka Doenges Bros. Ford, Inc.,** has a lien on the property which is the subject matter of this action by virtue of a judgment dated May 7, 1990, and recorded on May 9, 1990, in Book 5252, Page 362 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claim no right, title or interest in the subject real property

The Court further finds that the Defendants, **Robert E. Snider and Anita Kathleen McCaslin Snider**, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of

redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, **Robert E. Snider**, in the principal sum of $48,476.41, plus interest at the rate of 10 percent per annum from June 16, 1994 until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $35.00 for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Doenges Brothers Ford, Inc. aka Doenges Bros. Ford, Inc.**, have and recover judgment in the amount of $5,537.62 with interest at 15.75 per annum from the 6th day of March 1990, plus attorney's fees, for a judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Robert E. Snider, Anita Kathleen McCaslin Snider and Board of County Commissioners, Tulsa County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Robert E. Snider**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $35.00, personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, Doenges Brothers Ford, Inc. aka Doenges Bros. Ford, Inc., in the amount of $5,537.62, with interest and attorney's fees, for a judgment.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

NEAL B. KIRKPATRICK
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

M. E. McCOLLAM, OBA #5896
McCollam & Glassco, P.A.
Avanti Building, Suite 210
810 S. Cincinnati
Tulsa, Oklahoma 74119-1612
(918) 582-5880

Judgment of Foreclosure
Civil Action No. 94-C 638K

NBK:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JESS OLSON,

Plaintiff,

vs.

No. 89-C-979-E

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

O R D E R

Before the Court is the appeal of the Plaintiff Jess Olson (Olson) to the Defendant Secretary's denial of disability benefits.

Olson initially appealed the 1989 denial of disability benefits under the Social Security Act[1], asserting that "the evidence adduced at the hearing . . . shows without substantial contradiction that the Plaintiff is severely and irremedially disabled and continues to be disabled because of heart problems, high blood pressure, headaches, dizziness and pain." He claimed that, due to his disability, he could no longer work as a journeyman mailer or district court bailiff (his previous occupations), or any other occupation. Defendant sought a remand of the case to attain a mental status examination and vocational expert testimony, and the case was remanded to the Secretary on May 23, 1990.

After remand, the Administrative Law Judge recommended denial of benefits to Olson, and on March 18, 1992, the Apeals Counsel affirmed the recommended denial decision. The Administrative Law Judge found that Olson was not credible with regard to his fatigue

[1] Plaintiff's first claim was denied on February 28, 1989, and his request for review was denied by the Appeals Counsel on February 28, 1989.

and stress, and that his impairments do not prevent him from performing his work as a bailiff. The case was subsequently reopened in this Court on application of Olson, who takes issue with the Secretary's finding that he is not credible and the Secretary's failure to appraise the stress potential of his past job as a court bailiff.

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2 A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes V. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993); Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform other work which exists within the national economy. Diaz v. Sec'y

Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion. Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record of if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The evidence established that Olson had a 10th grade education and had not worked since July 31, 1983. From 1957 until 1983, he worked as a journeyman mailer, which involved lifting 50 to 100 pounds. He also worked for nine months as a district court bailiff in 1979. He testified that his work as a bailiff involved lifting 10 pounds, sitting four hours, and standing/walking the remainder of the work day. He testified however, that the work as a bailiff was stressful. While he was a bailiff, he had alot of headaches

but did not miss alot of work.

The medical evidence shows that plainitff complained of headaches in the late seventies approximately once a week that were not relieved by aspirin or sleeping. He had two heart attacks on September 12 and September 14, 1987, followed by a triple coronary bypass. Four weeks after the surgery, he was found to be doing well. On October 27, 1987, Dr. Coulter stated that he did not consider him to be disabled, and specifically "that there should be nothing preventing him from returning to his preoperative status." In February 1988, Olson told Dr. Coulter that he was walking one mile briskly daily. He complained of headaches about three times a week, describing them as mildly throbbing without any neurologic symptoms. In May 1988, he reported that he was still walking a mile a day, that he had no shortness of breath, but that his legs felt "heavy" afterward. At this time, Dr. Coulter noted that Olson was performing at full activity level, although he did not seem to "enjoy his return to full activity."

In 1990, Plaintiff's only complaint to Dr. Bartoloni was that he was tired and fatigued easily, and had tension headaches. He reported, however, that he did not have shortness of breath, and that the headaches went away with aspirin or a nap. He was still walking one mile a day.

Plaintiff then saw Minor Gordon, Ph.D., who found him to be "capable of responding adequately with co-workers and supervisors, and sustaining some type of work on a routine or repetitive basis." Dr. Thomas Goodman, who gave him a psychiatric examination, found

that psychologically, he should be able to return to the same level of work he was doing previously, and that he had a "fair" ability to deal with work stresses. On November 27, 1990, Olson was diagnosed with chronic lymphocytic leukemia, which did not yet require chemotherapy. At that time, an anti-depressant was prescribed for him.

The vocational expert testified that plaintiff's past work as a bailiff was a light, semi-skilled occupation. She also testified that the job was low stress, and that police were available to take the convict away. After hearing this evidence, the ALJ determined that Plaintiff had the capacity to perform his past light work as a bailiff.

In arguing that the Administrative law judge improperly concluded that Olson could return to work as a court bailiff, Plaintiff makes two arguments. First he argues that the 1991 ALJ is estopped from concluding that he can do his past relevant work because the first ALJ concluded that he could not. This argument is without merit. The conclusion of the ALJ in 1989 was that Olson could not perform his past relevant work of journeyman mailer. In these findings, the ALJ does not make any conclusions regarding, or even mention, Olson's past work as a court bailiff. The conclusions of the two ALJs therefore are not in conflict, and the only remaining issue is whether the finding that Olson could perform his past work as a bailiff is supported by substantial evidence.

Olson's second argument is that the ALJ failed to take into

account the stress potential of the court bailiff job. He argues that the secretary has the duty to investigate the stress level of any prior job and determine whether he had the capability of performing the job. Henrie v. U.S. Dept. Health & Human Services, 13 F.3d 359 (10th Cir. 1993). However, this case is distinguishable from Henrie. In Henrie, the court found that there was not a sufficient development of the record to determine the stress level of Plaintiff's job and whether Plaintiff was capable of handling that amount of stress. Here, Plaintiff is not arguing that the development of the record is insufficient, because he specifically is not requesting a remand. The Court finds that the record is sufficient to evaluate the stress potential of the bailiff job, and Olson's ability to handle stress. The evidence reveals that Olson's primary stress concern with the bailiff job was "putiing some big old hefty man or woman in jail," that the bailiff job is low stress because there are people other than the bailiff to take the convicted person away, and that Olson has a fair ability to handle job stress. The Court therefore finds that the decision to deny benefits is supported by substantial evidence, and the Secretary's denial of benefits is affirmed.

IT IS SO ORDERED THIS 16TH DAY OF DECEMBER, 1994.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FIRST COLONY LIFE INSURANCE COMPANY, a Virginia corporation,	)	
Plaintiff,	)	
v.	)	Case No.: 94-C-470BU
CLAY T. ROBERTS, DODIE S. NOLAND, and DEBORAH SUE HUFFMAN,	)	
Defendants.	)	

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties herein state to the Court that they agree and stipulate that Plaintiff's Complaint and Complaint as amended against Dodie S. Noland, Deborah Sue Huffman and Clay T. Roberts and the Counterclaim of the Defendants, Dodie S. Noland and Deborah Sue Huffman, may and should be dismissed with prejudice and hereby request the Court to enter its Order of Dismissal with Prejudice herein. Federal Rules of Civil Procedure, 41(A)(1)(ii).

FIRST COLONY LIFE INSURANCE CO.

By: _____

76

MONNET, HAYES, BULLIS, THOMPSON
& EDWARDS

By _____
John T. Edwards
1719 First National Center West
Oklahoma City, OK 73102
(405) 232-5481
Attorney for First Colony Life Ins. Co.

_____
Clay T. Roberts

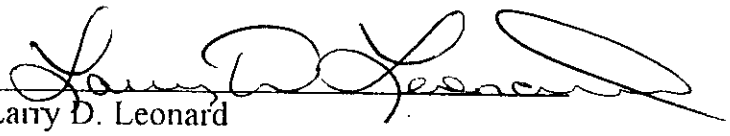
WAGNER, STUART & CANNON

By: _____
John B. Stuart
902 South Boulder
Tulsa, OK 74119-2034
(918) 582-4483
Attorney for Clay T. Roberts

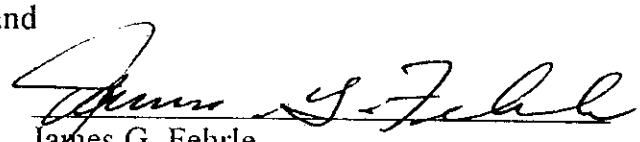
_____
Dodie S. Noland

_____
Deborah Sue Huffman

ZARBANO, LEONARD, SCOTT & FEHRLE

By: 
Larry D. Leonard

and


James G. Fehrle
1516 South Boston, Suite 316
Tulsa, OK 74119-4019
(918) 583-8700
Attorneys for Dodie S. Noland and Deborah Sue Huffman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONNIE COLE

Plaintiff,

vs.

TOM PHILLIPS, et al

Defendants.

No. 94-C-859-B

ORDER

By letter dated November 15, 1994, the Clerk advised the Plaintiff that Marshall forms, summons, and one copy of the complaint were necessary before the Court could proceed with service of process on the Defendants. The Clerk also mailed to the Plaintiff the requisite forms. As of the date of this order, the Plaintiff has failed to submit properly filled out forms to proceed with service of process. Accordingly, the Court will dismiss this action without prejudice for lack of prosecution.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Plaintiff's motion for leave to proceed in forma pauperis (doc. # 2) is **granted**;

(2) Plaintiff's motion for a temporary restraining order (doc. #3) is **denied** as it is insufficiently supported and fails to comply with the requirements of Fed. R. Civ. P. 65(b); and

(3) This action is **dismissed without prejudice** for failure to provide the Court with the necessary documents to proceed with service of process.

SO ORDERED THIS 15 day of Dec, 1994.

THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID RAY BOTTS,

Petitioner,

vs.

LEXINGTON CORR. CTR., et al.,

Respondents.

No. 92-C-758-B

ORDER

On November 18, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition as moot or to submit arguments in support of his claim, if any, that the appellate delay violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). The Court further advised Petitioner that his failure to comply with the order would result in the dismissal of this action.

As of the date of this order, Petitioner has not responded to the November 18, 1994 order. Accordingly, Petitioner's petition for a writ of habeas corpus is hereby **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have.

SO ORDERED THIS 12 day of Dec, 1994.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CARL PINE LEE,	)	
	)	
Appellee,	)	
	)	
v.	)	93-C-0895-B
	)	
THERMON CAROL KNIGHT, JR., a/k/a T.C. KNIGHT,	)	
	)	
Defendant(s).	)	

ORDER

Now before the Court is an appeal of a Bankruptcy Court decision. Appellant Thermon Carol Knight was convicted of pointing a shotgun at Appellee Carl Pine Lee. A state court jury, in a related civil action between the parties, also awarded Lee $409,818.49 in a civil judgment against Knight for intentional infliction of emotional distress, and for damages for burning Lee's barn.

Knight filed bankruptcy and Lee requested the $409,818.49 judgment be excepted from discharge under 11 U.S.C. §523(a)(6). The United States Bankruptcy Court for the Northern District of Oklahoma relied on the aforementioned state court proceedings and applied the doctrine of collateral estoppel. Consequently, the Bankruptcy Court refused to discharge the debt. Knight appeals that decision. For the reasons discussed below, the Bankruptcy Court's decision is **affirmed**.

I. Summary of Facts/Procedural History

The dispute began on November 23, 1980, when Knight pointed a shotgun at Lee. Lee had

17

accused Knight of setting fire to his barn.[1] Knight was subsequently arrested and, on June 26, 1981, a Okmulgee County state court jury convicted him of Feloniously Pointing a Weapon. The jury instruction that led to Knight's conviction read:

> **THERMAN CARROL KNIGHT did willfully, feloniously, and without lawful cause point a 12 gauge double-barreled shotgun at one Carl Lee for the purpose of threatening and intimidating him and with the unlawful, malicious, and felonious intent then and there on the part of said defendant to injure the said Carl Lee physically or by mental or emotional intimidation.** *Exhibit H to Plaintiff's Brief For Summary Judgment.*

About the same time that Knight's criminal prosecution was taking place, Lee filed a civil lawsuit against Knight, alleging damages for arson and intentional infliction of emotional distress. A jury trial was held in April of 1992. One of the jury instructions given the jury during the trial read:

> **If you find the conduct of the Defendant T.C. Knight was or amounted to oppression, malice (actual or presumed), or evil intent, then you may, in addition to actual damages, grant Plaintiff Carl Pine Lee exemplary damages in such sum as you reasonably believe will punish Defendant T.C. Knight and be an example to others.**

The jury, based on that instruction and others, awarded Lee $160,000 in compensatory damages and $100,000 in exemplary damages. The trial court judge specifically found **"clear and convincing evidence that the Defendant [Knight] is guilty of conduct evincing a wanton or reckless disregard for the right of another...That there was oppression and malice."** *Exhibit F to Plaintiff's Brief For Summary Judgment.*

On May 11, 1992, the District Court of Okmulgee County entered a Judgment against Knight (and in favor of Lee) for $388,340, which included $128,340 in

---

[1] *Lee's barn and some of his hay bales were burned. Knight was also charged with second-degree arson, but was not convicted of that charge.*

prejudgment interest. *Exhibit A to Plaintiff's Brief For Summary Judgment.* The judgment was affirmed by the Oklahoma Court of Appeals. *See, Supplemental Status Report (docket #8).*[2]

Some nine months after the judgment, in February of 1993, Knight filed Chapter 11 bankruptcy. On March 16, 1993, Lee filed a Complaint To Determine Dischargeability Of A Debt. In the Complaint, Lee asserted that Knight's judgment debt to Lee was non-dischargeable under 11 U.S.C. §523(A)(6) because the debt arose Knight's "willful and malicious injury" to Lee and his property.

On September 24, 1993, the Bankruptcy Court relied on collateral estoppel to establish the fact that Knight had acted willfully and maliciously under Section 523(a)(6) of the Bankruptcy Code. As a result, the court held, on summary judgment, that the debt owed by Knight to Lee was non-dischargeable under Section 523(A)(6).[3]

On October 1, 1993, Knight appealed. On appeal, Knight raises two issues: (1) Whether the Bankruptcy Court erred in its application of collateral estoppel; and (2) Whether the Bankruptcy Court erred in granting summary judgment because disputed issues of material fact remain concerning whether Knight received a fair trial in Okmulgee County. *Appellant's Brief (docket #4).*

II. Legal Analysis

Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt "for

---

[2] *On December 7, 1994, Knight notified the Court that the Oklahoma Supreme Court had denied certiorari on the state court case pertinent to this appeal. That, in effect, mooted three of his four arguments on appeal. See, Brief of The Appellant (docket #4). Therefore, the only issues remaining are whether the Bankruptcy Court properly applied collateral estoppel and whether the Bankruptcy Court erred in awarding summary judgment to Appellee.*

[3] *In its September 24, 1993 Order, the Bankruptcy Court found that the $409,818.49 judgment debt owed to Lee was excepted from discharge. The $409,818.49 figure includes $160,000 in compensatory damages, $100,000 in punitive damages and $149,818.49 in interest.*

willful and malicious injury by the debtor to another entity or the property of another entity." In addition, a bankruptcy court may invoke the doctrine of collateral estoppel to bar relitigation of the factual issues underlying the determination of the dischargeability. *In Re Wallace,* 840 F.2d 762, 764 (10th Cir. 1988). Collateral estoppel applies if (1) the issue to be precluded is the same as that involved in the prior state action, (2) the issue was actually litigated by the parties in the prior action, and (3) the state court's determination of the issue was necessary to the resulting final and valid judgment. *Id.* at 765.

In this case, Knight sought to discharge the debt Lee obtained in the civil court judgment. Lee objected under Section 523(a)(6). Instead of relitigating the factual issues concerning the dispute, the Bankruptcy Court applied collateral estoppel based on the earlier state court proceedings. Therfore, the issue is (1) whether the Bankruptcy Court properly applied collateral estoppel; and (2) whether it erred in excepting Knight's debt to Lee from discharge under Section 523(a)(6).

Under Section 523(a)(6), the creditor objecting to the discharge has the burden of proving that the debtor [Knight] (1) willfully and (2) maliciously injured the creditor [Lee} and/or his property. *In Re Posta,* 866 F.2d 364, 367 (10th Cir. 1989). The "willful" element simply means whether debtor intentionally performed the basic act complained of. *Id.*

The requisite "malicious intent may be demonstrated by evidence that the debtor had knowledge of the creditor's rights and that, with that knowledge, proceeding to take action in violation of those rights." *Id.* Consequently, as the Court noted in *Posta,* the debtor's

actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor are "highly relevant." *In Re Pasek*, 983 F.2d 1524, 1527 (10th Cir. 1993). The *Pasek* decision further notes:

> **In each case, evidence of the debtor's motives, including any claimed justification or excuse, must be examined to determine whether the requisite "malice" in addition to "willfulness" is present. One without the other will not suffice to bar a discharge under §523(a)(6); all the surrounding circumstances, including any justification or excuse offered by the debtor, are relevant to determine whether the debtor acted with a culpable state of mind vis-a-vis the actual injury caused the creditor.** *Id. at 1527.*

In the case at bar, the state court proceedings determined that Knight's conduct was willful and malicious. First, Knight was convicted of feloniously pointing a weapon at Lee. The jury instruction leading to that conviction indicated that Knight "willfully" pointed a shotgun at Lee with "malicious" intent. In addition, a state civil court found that Knight was liable to Lee for intentional infliction of emotional distress for pointing a shotgun at Lee and for the arson of Lee's barn and its contents. As a result, the jury awarded Lee $100,000 in punitive damages.[4] Furthermore, the trial court judge specifically found "clear and convincing evidence that the Defendant [Knight] is guilty of conduct evincing a wanton or reckless disregard for the right of another...That there was oppression and malice."

While Knight argues to the contrary, the Court finds the Bankruptcy Court's application of collateral estoppel proper. The collateral estoppel elements were met. First, the issue of whether Knight had willfully and malicious injured Lee is the same as was

---

[4] *As noted earlier, the jury instruction on exemplary damages read: "If you find the conduct of the Defendant T.C. Knight was or amounted to oppression, malice (actual or presumed), or evil intent, then you may, in addition to actual damages, grant Plaintiff Carl Pine Lee exemplary damages in such sum as you reasonably believe will punish Defendant T.C. Knight and be an example to others."*

decided by the state court. Second, the issue was actually litigated by Knight and Lee in the state court. Third, the state court's determination was necessary to the resulting final and valid judgment. As a result, the Bankruptcy Court properly found that Knight's debt to Lee was excepted from discharged under Section 523(a)(6). Therefore, the Bankruptcy Court's decision is **AFFIRMED.**[5]

SO ORDERED THIS 15th day of Dec., 1994.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[5] *Knight also contends the Bankruptcy Court erred in granting summary judgment because Lee prevented him from getting a fair trial in state court. Appellate review of summary judgment is de novo. Awbrey v. Pennzoil, 961 F.2d 928, 930 (10th Cir. 1992). However, although the litigation between Knight and Lee took an inordinate amount of time to resolve, the record does not indicate that the Bankruptcy Court erred in granting summary judgment to Lee.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN FRANCIS ROURKE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 94-C-454-B
	)	
ATTORNEY GENERAL OF THE UNITED STATES, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

On May 24, 1994, the Court reopened the above captioned case because Plaintiff had submitted a completed financial certificate. Although the Court received return of service on June 15, 1994, nothing has been filed in this case. Accordingly, the Court concludes that the above captioned case should be **dismissed** for lack of prosecution.

SO ORDERED THIS 15th day of Dec., 1994.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 13 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

OKAIR AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94-C-1-BU V
	)	
CORPORATE AIR,	)	
	)	
Defendant.	)	

94-C-11-BU V

STIPULATION FOR DISMISSAL

OKAIR Airlines, Inc. ("OkAir") and Corporate Air, Inc. ("Corporate Air") stipulate that all claims and causes of action asserted in this case are dismissed, with prejudice and with each party to bear its own costs, fees and expenses.

Respectfully submitted,

C. S. Lewis, III, OBA # 5402
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 W. 6th St.
Tulsa, OK 74119

Attorneys for Plaintiff,
OKAIR Airlines, Inc.

Frederick J. Hegenbart, OBA #10846
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Attorneys for Defendant,
Corporate Air, Inc.

ENTERED ON DOCKET
DATE 12-15-94

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUHIYR SALEEM,

Plaintiff,

vs.

No. 93-C-806-K

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

O R D E R

Plaintiff, Suhiyr Saleem, brings this action under 42 U.S.C. 1383(c)(3) to review the final decision of the Secretary denying plaintiff's claim for Title XVI Supplemental Security Income benefits. Plaintiff initially filed her application for Supplemental Security Income benefits on January 27, 1988, which was denied through the hearing level on January 23, 1989. (Tr. 10, 18). When plaintiff's appeal for reconsideration by the Appeals Council was denied on June 28, 1989, Ms. Saleem reapplied for benefits. After the second hearing, the Administrative Law Judge's ("ALJ") decision on December 17, 1990, was timely appealed by plaintiff. Upon review, the Appeals Council remanded her case for further consideration by the ALJ (1) to attempt to obtain the prior supplemental security income claims folder and resolve the issue of the possible reopening of the January 23, 1989 decision; (2) to obtain adequate evidence from the claimant's treating sources about the nature of and medical necessity for the claimant's prescribed medications; (3) to evaluate the nonexertional limitations imposed by the claimant's substance addiction disorder in accordance with SSR 88-13 and Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987);

(4) to re-evaluate the claimant's substance addiction disorder in accordance with SSR 82-60; to complete a Psychiatric Review Technique form in accordance with 20 CFR 416.920a; (5) to further consider the claimant's residual functional capacity and provide appropriate rationale (SSR 86-8); and (6) to secure the testimony of a vocational expert, if deemed necessary, to determine the effect of the claimant's limitations on her occupational base (SSR 83-14). Following a supplemental hearing on October 23, 1992, the Appeals Council affirmed the recommended decision of the ALJ issued March 17, 1993, in which the eligibility of the claimant was denied for Supplemental Security Income benefits and from which the claimant now appeals.

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §416.920 (1988). If a person is found to be disabled or not disabled at any point, the review ends. §416.920(a). The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)

2 A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).

3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).

4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).

5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

At the October 1992 hearing, plaintiff was a forty-six year-old black woman with a twelfth grade education. She had completed two years of nursing school at the University of New Mexico and some additional tailoring courses in 1986 or 1987. Although Ms. Saleem had not worked since the early 1970's, her employment history included janitor for a telephone company, church secretary and nursing assistant for three different hospitals. Plaintiff's medical history reveals an on-the-job back injury in 1971 and a slip-and-fall injury in 1982. She complains of constant back pain, radiating into her legs and hands, headaches and faulty memory. (Tr. 83-85, 87, 93-94, 99, 546-549, 554, 556). Plaintiff testified the pain has been severe "for the past couple of years" and "it's not anything that I do or don't do" that makes the pain worse. (Tr. 88). Because of the severe pain, she has been treated with Valium, Talwin, Voltaren, Flexeril and Xanax for a period of 7-10 years. (Tr. 419, 485, 541). She contends that the medication makes her sleepy and drowsy, and she has experienced hair loss,

chest pains, skin rash, blurred vision and has trouble remembering. (Tr. 99-100, 550-553). She takes her medication three times a day, usually 10:00 a.m., 5:00 p.m. and at bedtime. (Tr. 89-90). Her daughters, ages 8, 12, 14, do most of the housework and cooking although she occasionally may cook a meal or clean her room "if she feels like it." She is able to drive some days and takes the 8 year old to school. (Tr. 559-560). Claimant contends she cannot be on her feet "more than 30 minutes", cannot sit, stand or lie down without experiencing pain, is limited on bending, "tries not to lift anything," and sleeps "maybe three or four hours" per night. (Tr. 101-105, 557-559). She does no exercises, occasionally shops for groceries but takes the children "so they can pack the bags," sometimes drives the car "around here in Tulsa," visits her sister by telephone daily and "if I feel up to it" may go to her sister's house, and occasionally attends a wedding or church. (Tr. 105-107). She spends most of her day lying in bed, watching TV, and talking to her sister on the phone for an hour or longer at a time. She also denies being mentally retarded or addicted to any medications. However, claimant claims that she cannot work because of the combination of severe pain and side effects of the medications. Further, she denies ever receiving treatment from, or being evaluated by, a psychiatrist or a mental health professional. (Tr. 127-128, 394-397).

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable

mind would accept as adequate to support a conclusion. Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990) (evidence not substantial if overwhelmed by other evidence or merely a conclusion); Bernal v. Bowen, 851 F.2d at 299; Williams v. Bowen, 844 F.2d 748, 750 (10th Cir. 1988) (same). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

The ALJ determined during the evaluation process at Step 1 that claimant had not performed substantial gainful activity since September 20, 1989; at Step 2 that claimant did not have a vocationally severe impairment; and at Step 3 that claimant's impairment did not meet or equal the signs, symptoms, and laboratory findings required for any listed impairment; at step 4 he found plaintiff had no past relevant work; however, at step 5 he found plaintiff retained the capacity to perform alternative work types which exist within the national economy.

Plaintiff makes the following objections to the decision of March 17, 1993:

(1) Failure to consider the effect of the substance

abuse disorder on her ability to perform substantial gainful activity;

(2) Erroneous evaluation of her complaints of pain;

(3) Erroneous conclusion that she can engage in light work in view of her pain and other nonexertional limitations; and

(4) Failure to reopen the prior hearing decision dated January 23, 1989.

Plaintiff contends that due to error on the face of the judgment dated January 23, 1989, her application of January 27, 1988, should be reopened and benefits should be granted accordingly. There is no indication the previous January 1987 claim was reconsidered on the merits. In fact, the ALJ specifically addressed the issue of the possibility of reopening the prior claim and subsequent decision by indicating he "has not considered the merits of that decision." (Tr. 47). The mere allowance of evidence from the earlier applications, without more, cannot be considered a reopening of the earlier case. Burks-Marshall v. Shalala, 7 F.3d 1346, 1348 (8th Cir. 1993). The record does not indicate the ALJ used the prior evidence in his denial of the plaintiff's claim for the relevant time period. There being no violation of a constitutional claim nor evidentiary hearing conducted on a request to reopen, this Court lacks jurisdiction to reopen the prior applications. Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); Cottrell v. Sullivan, 987 F.2d 342 (6th Cir. 1992); Kasey v. Sullivan, 3 F.3d 75 (4th Cir. 1993). While noting the provision under 20 CFR §404.989(a) that a

determination or decision will be reopened if (1) new and material evidence is furnished; (2) a clerical error in the computation or recomputation of benefits was made; or (3) the evidence that was considered in making the determination or decision clearly shows on its face that an error was made, the ALJ concluded that "the evidence reviewed does not meet any one of the three standards... ." (Tr. 47). Consequently, since neither "good cause nor any other basis to reopen exists," the ALJ concluded the decision dated January 23, 1989, stands as the final decision of the Secretary on the claimant's application of January 27, 1988, and would not be reopened, and this Court lacks jurisdiction to find otherwise. (Tr. 47).

The medical record revealed a complete evaluation and tests in September 1985 by her treating physician, Dr. Bowler. Results were minor degenerative changes at C6-7 (Tr. 31, 34, 468); no fracture or intervertebral encroachment of the left shoulder (Tr. 31, 467); normal lumbar spine series (Tr. 32, 466); cervical spine negative for fracture (Tr. 467); normal lumbar myelogram (Tr. 32, 465); and subsequent CT of lower lumber was normal (Tr. 32, 469). Nerve conduction studies were done at the same time on the left upper and lower extremities. The upper left extremities were normal without evidence of myopathy, neuropathy, nerve root irritation or other abnormality while the left lower extremities revealed L5, S1 radiculopathy. (Tr. 463-464). Dr. Bowler's discharge summary was L5, S1 radiculopathy secondary to nerve root compression and left shoulder sprain. He also indicated "no anatomic sites that were

surgically amenable to correction" and claimant "was informed she would probably always have some problems with lower back pain." Discharged with treatment by medication of Motrin 800 mgs. tid; Flexeril 10 mg. tid; and Talwin NX, 1 every 6 hours. And in March 1986, Dr. Bowler reported that claimant's work tolerance was sedentary with "fair" ability for standing and walking as opposed to "poor" ability for bending and lifting. (Tr. 429).

Dr. Kache's examination of claimant on August 27, 1986, revealed a well-developed, well-nourished female who was alert, oriented and cooperative in no apparent distress. Back range of motion in all directions was within normal limits. Neurological examination revealed 2+ knee and ankle jerks, and muscle strength testing revealed no deficits. Sensation to pin prick was within normal limits; straight leg raises negative, bilaterally; able to come up on toes and heels without difficulty. Palpation of the back reveals a moderate degree of tenderness in the lumbar paraspinals as well as in the midline with recommendation to continue use of the TENS unit. He saw "no contraindications for the patient participating in a vigorous retraining program in order to become a productive employee again." (Tr. 456).

An orthopedic examination and evaluation by Dr. Harris in February 1987 revealed periodic wrist tenderness with non-rheumatological etiology and probable situational depression. X-rays of her wrists and hands were within normal limits with no loss of range of motion or modularity in the hands. Since sedimentation rate was also within normal limits, he felt claimant would not be

limited in her tailoring type of activity. (Tr. 446-449).

In August 1987 Dr. Calhoun's report indicated "she is independent for her activities of daily living but does not do any significant housework... ." Examination of her back revealed no tenderness over the spine per se or CVA, but some tenderness over the lower thoracic and lumbar paraspinous muscles bilaterally. Muscle mass and tone of her extremities was normal as was gait and stance. Back range of motion was 30° flexion, 15° extension with tenderness over lower thoracic and lumbar paraspinous muscles. Normal heel-toe walking; negative leg raises from sitting position; and normal strength in both feet. There was no focal neurological deficits and she was alert and oriented with normal speech and thought patterns. His assessment was chronic low back pain mostly thoracic and lumbosacral musculoligamentous strain. (Tr. 440-444).

Dr. Richard Cooper's examination of claimant on March 23, 1988, indicated she was alert, oriented, drove herself to the exam, and her posture and gait were good. Range of motion of cervical spine, fingers, wrists, elbows, shoulders, knees and ankles were full range. Range of motion of thoracolumbar spine was also full range but she complained of some pain with forward bending at 90 ° and pain with most manipulations of the hips and lower extremities. However, seated straight leg raises were negative, and she was able to walk on toes and heels without difficulty. Neurological examination showed cranial nerves II-XII were grossly intact. Achilles reflex was 1+ on the left and 2+ on the right. Vibratory sense was intact in the lower extremities. Tinel's test, prayer

sign and Phalen's test were all negative. (Tr. 420-421).

Physical examination by Dr. McCullough in November 1989 revealed "an alert, cooperative female though she seemed to move around fairly well until ready to climb onto the table and perform maneuvers at which time she became somewhat agitated, began to groan and moan significantly more than when she had moved around the room or even getting on the table initially." There was no muscle atrophy, no evidence of joint deformity, redness, swelling, heat or tenderness, and her gait was stable. His brief mental status examination seemed to be "within normal range for crude testing." (Tr. 269-270).

Dr. Cooper again examined plaintiff on April 27, 1990. Current medications were Xanax, Voltaren, Flexeril and Talwin. Claimant appeared well-nourished, oriented (she drove herself to the doctor's office and had no trouble finding it), stood erect and walked with a good gait. No varicosities, no ulcerations of extremities, but she did have weak arches. Dorsalis pedis and radial pulses and 2+ and equal. Range of motion of the cervical spine in side bending right and left, flexion right and left rotation were all full range. Extension was 35 degrees with forward bending 70 degrees. Thoracolumbar spine, right and left side bending and extension, were all full range. Range of motion of the fingers, wrists, elbows, shoulders, hips, knees and ankles were all full range. There was some palpable tender muscle spasm in the thoracic and lumbar paraspinal musculature. "In summary, this lady has some discomfort in the low back, some headaches and

some chest discomfort. I believe she would be impaired in any activity requiring prolonged standing, sitting, bending, twisting, and lifting." (Tr. 283-285).

Plaintiff was presented for psychological examination on November 9, 1990, to Dr. Minor Gordon. Observations of claimant's behavior and test results "would not support a severe chronic pain syndrome, at least one that would preclude her from gainful employment." Intellectually, she scored 79 on the full range IQ of the Weschsler Adult Intelligence Scale Revised. It was his opinion that claimant was addicted to narcotic analgesic which is secondary to an hysterical personality disorder. However, he stated, "the hysterical personality disorder certainly would not preclude her from gainful employment." Claimant was oriented to time, person and place. Her immediate retention and recall, short and long-term memory, were all considered to be adequate. (Tr. 22-24).

Examination on July 22, 1992, Dr. Goodman related that claimant's most salient psychiatric problem stems from her long use of narcotic drugs for what "she calls chronic and increasingly severe pain." (Tr. 26, 394). Claimant stated "she is not mentally retarded and that she is not addicted to medications." (Tr. 27, 395). At the same time, claimant indicated she was unable to work because the medication makes her sleepy and not alert mentally, "although these were not definitely observable during the evaluation with her." (Tr. 28, 396). She denied any specific psychiatric problems or any problems with anxiety or nervousness, but admitted she was taking Xanax in order not to be anxious or

nervous. "There were contradictory statements regarding the element of anxiety and whether she needed to take the medication." (Tr. 27, 394). It was his impression that "she is addicted to both Talwin and Xanax" with indications that she is gradually increasing doses and has not been seen by a psychiatrist or chemical dependency specialist. "Clinically, she appeared to be alert enough and intelligent enough that psychologically, she should be able to carry on at least a moderately complicated work activity." (Tr. 29, 397).

The medical expert, Dr. Goldman, testified at the hearing that because of substance abuse claimant's ability to do work should be restricted by (1) not allowing her to drive a motor vehicle, (2) prohibiting her from climbing, and (3) prohibiting her use of dangerous machinery. "Other than those restrictions I find no restrictions in her residual functional capacity." (Tr. 136). Based upon his observations of claimant, her testimony and the medical evidence, Dr. Goldman completed the Psychiatric Review Technique form, indicating 12.09 substance addiction disorder involving Talwin and Xanax (narcotic) for 10 years along with 12.02 organic mental disorder and 12.08 personality disorder. However, the degree of limitation on claimant's functional capacity did not satisfy the requirements of an impaired listing. (Tr. 574).

Claimant's allegations of pain and/or limitations were appropriately analyzed and evaluated by the ALJ in applying the guidelines set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987), 20 CFR 404.1529(c)(3), 20 CFR 416.929(c)(3), and SSR 88-13.

Covering each of the eight factors enumerated, the ALJ concluded that claimant's pain is mild to moderate and would not interfere with her concentration or performance of work-related activities, if of "light residual functional capacity or less." (Tr. 52). Plaintiff's treating physician, Dr. Andelman, reported May 1992 there was "no definite radiation;" pain was controlled by medication; and she was able to sleep once the medication took effect. He listed her functional limitations as: unable to walk in stores for more than 30 minutes without aggravation of pain; has some pain on sitting, needs back support; difficulty in lifting with her left arm; can bend with difficulty; little pain with reaching; some limitation on grasping, pulling and/or pushing. (Tr. 386-392). Although claimant contends her pain is disabling, a claimant's subjective allegation of pain is not sufficient in itself to establish disability. Thompson v. Sullivan, 987 F.2d 1482, 1488 (10th Cir. 1993). The Tenth Circuit has held that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Huston v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). Substantial evidence supports the ALJ's conclusion that the testimony of the claimant is not credible, due in part, to marked secondary gain motivation. See Luna v. Bowen, 834 F.2d at 163. Determining the credibility of the witnesses and the evidence is solely the province of the ALJ. Williams v. Bowen,

844 F.2d 748, 755 (10th Cir. 1988).

Accordingly, under 20 CFR §404.1520a, and relying upon the significant medical history, Dr. Gordon's and Dr. Goodman's examinations, the testimony of the medical expert, and the testimony of plaintiff, the ALJ completed the OHA Psychiatric Review Technique Form, finding claimant has a slight degree of limitation on her activities of daily living and maintaining social functioning; a seldom degree of limitation on her concentration imposed by the claimant's IQ and hysterical perception of her pain; and devoid of limitations on deterioration or decompensation. In determining whether a finding is supported by substantial evidence, this court must consider the record as a whole. Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988). The record, taken as a whole, substantiates the ALJ's conclusion and justifies a reduced reliance on claimant's subjective complaints. See 42 U.S.C. §423(d)(5)(A).

Although the claimant had no past relevant work and could not perform her past relevant as required at Step 4 of the evaluation process, there is substantial evidence in the record to support the conclusion by the ALJ that plaintiff's impairment does not prevent her from performing some type of work at the light to sedentary exertional level. At Step 5, the burden shifts to the Secretary to show that the claimant retains the residual functional capacity (RFC) to do other work that exists in the national economy. See Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991); see also 42 U.S.C. §423(d)(2)(A). The Secretary has established RFC categories of sedentary, light, medium, heavy, and very heavy,

based on the physical demands of the various kinds of work in the national economy. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993); see also 20 CFR §404.1567. Light and sedentary work are defined as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weight up to 10 pounds... [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls.
> §404.1567(b)

> Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. §404.1567(a)

Testimony from the vocational expert identified a significant number of jobs in the national economy which claimant could perform. A series of hypothetical questions were posed, taking into consideration claimant's age, education, vocational abilities, narcotic substance addiction with side effects limited climbing, driving, and being around machinery; limited walking of 30 minutes or less, lifting with the left arm, grasping; limited in ability to perform five repetitions of pushing/pulling as well as limited fine motor dexterity; good occupational, performance, personal and social adjustments; and fair to good ability to remember and carry out simple, detailed and/or complex job instructions. (Tr. 186-191). Claimant would still be able to perform these sedentary and light exertional jobs: **cashier**, sedentary level, 615,000 nationally and 4,024 in Oklahoma; light level, 922,000 nationally and 6,037 in Oklahoma; **teacher's aid**, sedentary level, 123,000

nationally with 439 in Oklahoma; light level, 128,000 nationally and 457 in Oklahoma; and **assembly**, sedentary level, 211,000 nationally and 1,324 in Oklahoma; light level, 1,072,000 nationally with 3,815 in Oklahoma. (Tr. 54, 191, 111, 564).

The plaintiff has the burden to make a prima facie case she is unable to return to the prior work she performed (i.e., janitorial, church secretarial, nurse's aid), Bernal, 851 F.2d at 299, which burden the ALJ concluded plaintiff sustained. Once the claimant meets this burden, it is up to the Secretary to show that the claimant can perform other work on a sustained basis. Even though claimant's additional nonexertional limitations do not allow her to perform the full range of light work using as a framework §416.969 of Regulations No. 16 and Rule 202.20 of Regulations No. 4, the record supports the ALJ's conclusion that Ms. Saleem was able to perform a significant number of jobs existing in the regional and national economies, and therefore, was "not disabled."

Therefore, the Court finds there is sufficient relevant evidence in the record to support the ALJ's findings and conclusions that the claimant, Suhiyr Saleem, is not eligible for Supplemental Security Income under Sections 1602 and 1614(a)(3)(A) of the Social Security Act. The Secretary's decision is, therefore, AFFIRMED.

IT IS SO ORDERED THIS 14 DAY OF DECEMBER, 1994.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHAWN CLAYBROOKS, Plaintiff,	)	
vs.	)	Case No. 94-C-801-B
FORD MOTOR CREDIT COMPANY, INC., FRED JONES FORD, RANDY JACKSON, Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Come now Plaintiff Shawn Claybrooks and Defendants Ford Motor Credit Company and Randy Jackson, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate that this action and all Plaintiff's claims against the Defendants herein are hereby dismissed with prejudice. Each party hereto shall bear its own costs and attorneys' fees.

Executed this 14 day of December, 1994.

Shawn Claybrooks

SHAWN CLAYBROOKS
8915 E. 92nd Court
Tulsa, Oklahoma 74133

PLAINTIFF

WILLIAM E. HUGHES, # 2069
Attorney at Law
320 S. Boston, Suite 1020
Tulsa, OK 74103
(918) 587-1400

ATTORNEY FOR DEFENDANT RANDY JACKSON

STEPHEN D. DeGIUSTI, 10272
DAVID L. NUNN, 14512

-Of the Firm-

CROWE & DUNLEVY
A professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

ATTORNEYS FOR DEFENDANT FORD MOTOR CREDIT COMPANY

626.94B.DLN

MATTHEW A.P. SCHUMACHER, #10468
Attorney at Law
P.O. Box 2733
110 North Third Street
Tulsa, OK 74402-2733
(918) 682-1100

AND

A. CAMP BONDS, JR., #944

- Of the Firm -

BONDS, MATTHEWS, BONDS & HAYES
P.O. Box 1906
Muskogee, OK 74402-1906
(918) 683-2911

ATTORNEYS FOR PLAINTIFF SHAWN CLAYBROOKS

626.94B.DLN

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 13 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

OKAIR AIRLINES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94-C-1115
	)	
CORPORATE AIR,	)	
	)	
Defendant.	)	

STIPULATION FOR DISMISSAL

OKAIR Airlines, Inc. ("OkAir") and Corporate Air, Inc. ("Corporate Air") stipulate that all claims and causes of action asserted in this case are dismissed, with prejudice and with each party to bear its own costs, fees and expenses.

Respectfully submitted,

C. S. Lewis, III, OBA # 5402
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 W. 6th St.
Tulsa, OK 74119

Attorneys for Plaintiff,
OKAIR Airlines, Inc.

Frederick J. Hegenbart, OBA #10846
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211

Attorneys for Defendant,
Corporate Air, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PW/GEODYNE PRODUCTION PARTNERSHIP II-A; PW/GEODYNE PRODUCTION PARTNERSHIP II-B; and PW/GEODYNE PRODUCTION PARTNERSHIP II-C, General Partnerships,

Plaintiffs,

v.

WOLVERINE EXPLORATION COMPANY, a Corporation,

Defendant.

Case No. 93-C-166-K

ORDER

Now before the Court for its consideration is defendant Wolverine Exploration Company's ("WECO") motion for summary judgment on all claims brought in plaintiffs' first amended complaint.

The primary facts are undisputed. WECO (as Seller) and plaintiffs (as Buyers) entered into a Purchase and Sale Agreement (the "Agreement") dated February 26, 1988, in which plaintiffs bought certain oil and gas properties in Oklahoma and other states from WECO. The Agreement was negotiated and executed in Texas. The Agreement provided in paragraph 11.11 that it, and the transactions connected with it, were to be governed by, and construed according to the laws of Texas. The Agreement's effective date was February 29, 1988. Closing of the Agreement occurred on April 18, 1988 and a second closing occurred on May 26, 1988.

45

On February 25, 1993, plaintiffs filed their original complaint in this action, alleging six claims against WECO for failure to remit to plaintiffs revenues received from the sold properties after the effective date of the Agreement. This action was stayed while plaintiffs and WECO worked to settle plaintiffs' claims. A settlement was not achieved, however, and the stay was lifted. On December 16, 1993, plaintiffs filed a first amended complaint, which asserted six claims against WECO based upon gas imbalances on seven Oklahoma wells, allegedly caused by WECO just prior to the effective date of the Agreement. Plaintiffs alleged that WECO overproduced those seven wells in the month prior to the Agreement, and retained the proceeds received from the overproduction.

In its motion for summary judgment, WECO raises a number of legal challenges to plaintiffs' claims against it. WECO asserts that plaintiffs' breach of contract claims are time-barred under the applicable state law and by the provisions of the Agreement. WECO also contends that no implied covenant of good faith and fair dealing exists, as a matter of law, in the parties' Agreement and that WECO thereby did not owe a fiducial duty to plaintiffs. WECO additionally disputes plaintiffs' right to equitable relief in this action. WECO seeks the Court's imposition of sanctions under Fed.R.Civ.P. 11 for what it contends is plaintiffs' frivolous filing of this action.

I. Statute of Limitations: Choice of State Law and Relation Back.

Jurisdiction in this action is based upon diversity of the

parties, pursuant to 28 U.S.C. §1332. "A federal court hearing a diversity action applies the statute of limitations which would be applied by a court of the forum state, even when the action is brought under the law of a different state." Dow Chemical Corp. v. Weevil-Cide Co., Inc., 897 F.2d 481, 483-84 (10th Cir. 1990). Oklahoma law holds that the law of the forum state governs the statute of limitations on an action on a contract. See Shaw v. Dickinson, 65 Okla. 186, 164 P. 1150, 1150 (1917). Under Oklahoma law, an action on a written contract must be brought within five years. Okla. Stat. tit. 12, §95(1) (1991).

Plaintiffs maintain that they timely filed this action within five years of the effective date of the Agreement. WECO argues that plaintiffs' amended complaint, filed on December 16, 1993, presented new claims against WECO and thus did not "relate back" under Fed.R.Civ.P. 15(c), to bring the amended complaint's claims within the five year limitations period.

Rule 15(c) provides in part that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Where, as here, a plaintiff seeks to add new claims against an original defendant, "the court compares the original complaint with the amended complaint and decides whether the claim to be added will likely be proved by the 'same kind of evidence' offered in support of the original pleading." Percy v. San Francisco General Hosp., 841 F.2d 975, 978 (9th Cir. 1988)

(quoting Rural Fire Protection Co. v. Hepp, 366 F.2d 355, 362 (9th Cir. 1966)). The Court must consider whether the original and amended pleadings share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence or conduct in issue. Martell v. Trilogy Ltd, 872 F.2d 322, 325 (9th Cir. 1989).

From its comparison of plaintiffs' original and amended complaints, the Court finds that both pleadings basically allege plaintiffs' belief that they did not receive all of the revenues to which they allegedly were entitled from their purchase transaction with WECO. In their original complaint, plaintiffs seek an accounting and remittance of revenues held by WECO allegedly after the effective date of the Agreement; in their amended complaint, plaintiffs seek an accounting and remittance of revenues from wells which WECO allegedly overproduced just prior to the effective date of the Agreement. Both complaints allege wrongful retention of revenues by WECO in relation to the parties' Agreement. The Court finds that the same type of documentary evidence relating to WECO's receipt of revenues under the Agreement will be as applicable to proving the allegations of the amended complaint as would be to proving those in the original complaint. In that plaintiffs have alleged a wrongful retention of funds by WECO in connection with their Agreement in both the amended and original complaints, the Court finds that the two complaints share a common core of operative facts, and plaintiffs thereby have given WECO fair notice of the claims presented in their amended complaint. The Court thus

concludes that, pursuant to Fed.R.Civ.P. 15(c), plaintiffs' amended complaint relates back to the date of filing of plaintiffs' original complaint. The amended complaint may therefore be deemed to have been filed before the five-year statute of limitations in Okla. Stat. tit. 12, §95 had run.

II. Contractual Limitations.

WECO argues that the parties' Agreement prevents plaintiffs from challenging WECO's gas balancing representations and from seeking a post-closing adjustment to the purchase price. WECO relies upon paragraph 9.04 of the Agreement, which provides:

> 9.04 Survival. The representations, warranties, covenants, except those which relate to price adjustment, agreements and indemnities included or provided in this Agreement, and in any Exhibit, document, certificate, instrument or other instrument delivered pursuant hereto, shall survive until 24 months after the Closing.

WECO argues that plaintiffs' action is based upon the alleged breach of the representations WECO made in paragraph 3.01(f) of the Agreement, which stated, in pertinent part:

> Except as set forth in Exhibit "E", there exists no material imbalance with respect to shares of production taken or marketed from or attributable to any of the Interests under which any party other than Seller or Buyer is entitled to produce more than an insignificant quantity of hydrocarbons after the Effective Time that, in the absence of such imbalance, would have been produced by Seller or Buyer.

WECO contends that plaintiffs had 24 months after the Closing to challenge the representations made by WECO in paragraph 3.01(f). WECO argues that since plaintiffs failed to timely challenge those representations, plaintiffs now cannot bring an action for breach of contract based upon those representations.

In response, plaintiffs argue that paragraph 9.04 is void and unenforceable under an Oklahoma statute which prohibits the parties from limiting the time within which they can bring an action to enforce their rights under a contract. Plaintiffs specifically point to Okla. Stat. tit. 15, §216 (1991), which provides:

> Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

From its comparison of paragraph 9.04 with §216, the Court finds no restrictions as to proceedings or tribunal in which the parties may enforce their rights under the Agreement. The Court also finds no time limit in paragraph 9.04 which requires the parties to enforce their rights. The Court construes paragraph 9.04 to require both parties to question or challenge any representations or warranties made in the Agreement within 24 months after the Closing. The parties are free to bring an action any time within the statutory five-year limitations period to enforce their rights pertaining to the representations, warranties and indemnities in the Agreement, so long as they timely made their challenge to those representations or warranties within the prescribed 24 months.

In their reliance upon §216, plaintiffs have failed to distinguish between an impermissible time limit in which a party must enforce contract rights, and time limits set by the parties in their contract which require the parties' performance or action. The Oklahoma Supreme Court recognized this distinction in

construing statutory language identical[1] to §216 in Midland Valley R. Co. v. Ezell, 29 Okla. 40, 116 P. 163 (1911). In Midland, the contract there required the claimant to give notice of loss, damage or injury to an officer of the defendant; if such notice were not so given within ninety-one days of the date the loss was sustained, the contract provided that the claim would then be barred. Id. at 164. The Oklahoma Supreme Court found that contract provision "does not attempt to fix the time within which suit thereon, if any, shall be brought; nor is it here urged that this action cannot be prosecuted because not brought within any time fixed by the contract." Id. The Oklahoma Supreme Court further noted,

> The contract in this case does not attempt to restrict either of the parties as to the character of proceeding in which he shall enforce his rights thereunder. It does not impose a limitation upon the time proceedings shall be taken to enforce the rights of either party; but its terms do provide that there shall be no right for damages under the contract arising from certain causes named therein, unless the notice stipulated for shall be given. The stipulation creates a condition precedent to existence of the right, rather than a limitation upon the enforcement of that right, and does not, we think, fall within the statute.

Id. Here, paragraph 9.04 required the parties to act within a defined time period, much as the notice provision required timely action by the plaintiff in Midland. Similar to the court's reasoning in Midland, the Court here does not find that paragraph 9.04 places an impermissible time limit upon the parties to enforce their rights under the Agreement. The Court concludes that Okla. Stat. tit. 15, §216 does not render paragraph 9.04 of the Agreement

---

[1] The same language found in §216 previously was codified in Okla. Comp. Laws 1909, §1128.

void and unenforceable in this action.[2]

It is undisputed that plaintiffs did not seek any reconciliation or make any challenge to WECO's gas imbalance representations within the contractually-designated 24 month period following the Closing of the Agreement. Pursuant to paragraph 9.04, those representations, warranties and indemnities contained in the Agreement have not survived and have expired. Plaintiffs now have no grounds for their breach of contract cause of action based upon WECO's gas imbalance representations or indemnities. Accordingly, the Court finds that WECO's motion for summary judgment on this issue should be granted.

III. Implied Covenant of Good Faith and Fair Dealing.

Plaintiffs allege that during the course of negotiations and execution of the Agreement, WECO occupied a fiduciary position and breached its duty owed to plaintiffs by failing to remit payment of monies to plaintiffs. WECO denies that it was a fiduciary or owed any duty as such to plaintiffs.

As the parties recognize, Texas law does not imply a covenant of good faith and fair dealing in every contract. Such a covenant is implied only when a special relationship exists between the

---

[2] The parties disagree as to whether paragraph 9.04 creates a substantive or a procedural right under the Agreement. WECO argues that Texas law governs the substantive law of the Agreement and that §216 is a procedural statute and therefore not applicable. Since the Court has determined that §216 is not applicable to paragraph 9.04, the Court will not address the substantive-procedural argument.

parties.[3] Childers v. Pumping Systems, Inc., 968 F.2d 565, 569 (5th Cir. 1992). In their briefs, plaintiffs allege that WECO had the requisite "special" relationship with the plaintiffs. According to plaintiffs, WECO maintained "control" during the negotiation and execution of the Agreement, creating "special circumstances" between WECO and plaintiffs that resulted in a fiduciary relationship. See Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 10-11.

WECO challenges plaintiffs' characterization of the Agreement as creating a fiducial relationship between it and plaintiffs. WECO submitted affidavits stating that both parties were represented by counsel during negotiation and execution of the Agreement. WECO also points out that the Agreement requires it to turn over all files and documents related to the Agreement to plaintiffs within 90 days of the Closing. An affidavit submitted by WECO states that WECO in fact did turn over all of that information to plaintiffs. WECO contends, and the Court agrees, that these facts refute plaintiffs' allegations of "control" by WECO.

Plaintiffs have not responded to WECO's affidavits with their own affidavits or other evidence which would tend to support their otherwise conclusory allegations of WECO's "control" over them. To

---

[3] The Childers decision cited as examples of "special relationships" giving rise to fiduciary duties that of insurer and insured, principal and agent, joint venturers and partners. 968 F.2d at 568. Plaintiffs have not alleged that the "special relationship" they claimed to have with WECO took any of these cited forms.

avoid summary judgment, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [their] own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The Court finds that plaintiffs have failed to carry their burden in supporting their allegations of "control" by WECO or that a "special" relationship was created between WECO and plaintiffs in the course of negotiations and execution of the Agreement. The Court finds, as a matter of law, that WECO was not a fiduciary and owed no duty as such to plaintiffs. The Court will therefore grant WECO's motion for summary judgment on this issue.

IV. Equitable Remedies.

Plaintiffs also seek equitable remedies such as an accounting, imposition of a constructive trust, and disgorgement of unjust enrichment, as means to recovering WECO's alleged retention of the overproduction proceeds from the seven wells. WECO denies that plaintiffs are entitled to receive any such equitable relief in this action.

Several maxims of equitable jurisprudence guide the Court in determining whether plaintiffs should be granted the relief in equity they seek. One such maxim is that "equity follows the law." Where the rights of parties are clearly defined and established by law, equity has no power to change or unsettle those rights. Cantrell v. Marshall, 200 Okla. 573, 197 P.2d 990, 991 (1948). Here, the parties' rights are set forth by the Agreement, which is

not alleged by plaintiffs to be ambiguous. The Agreement clearly provides that WECO, as the Seller, was entitled to retain all proceeds from production achieved prior to the Effective Date, while plaintiffs, as Buyers, were to retain all proceeds from production achieved the month following the Agreement's Effective Date. The Agreement provided a means for the parties to reconcile their conflicts as to the allocation of production immediately before and after the effective date. The Court has ruled today, as a matter of law, that plaintiffs did not timely seek that reconciliation under the terms of the Agreement and plaintiffs now have no legal right to enforce such a reconciliation by WECO. "[W]hile the maxims of equity may be invoked to protect an existing right, they are not available to create a right where none exists." Welch v. Montgomery, 201 Okla. 289, 205 P.2d 288, 291 (1949); see also Ray v. Peters, 422 S.W.2d 615, 616 (Texas Ct. App. 1967) ("This appeal to equitable relief invokes the maxim, 'equity follows the law', under which equity will not create a remedy where there is no legal liability.") Under the terms of their Agreement, plaintiffs have lost the right to challenge WECO's production achieved prior to the effective date. The Court will not use equity now as a tool to reclaim that lost right for plaintiffs.

Plaintiffs should also note that "[a] court of equity will not assist one in extricating himself from circumstances which he has created." State ex rel. Burk v. Oklahoma City, 522 P.2d 612, 619 (Okla. 1973); see also Sautbine v. Keller, 423 P.2d 447, 451 (Okla. 1966)("Equity cannot be invoked when its aid becomes

necessary through a party's own fault"). From its review of the Agreement, the Court observes that paragraph 9.02 required WECO to submit all of its records, production and otherwise, on the purchased properties to plaintiffs within ninety days after the effective date. Affidavits from WECO aver that such records were provided to plaintiffs, who have not confirmed that they received those records. Paragraph 9.01(c) of the Agreement required plaintiffs, as Buyers, to submit a final accounting statement to WECO, covering the time from the Agreement's Effective Date to the date of Closing.[4] Presumably, that final accounting statement would have included the time in which the alleged overproduction revenues would have been received by WECO. Neither plaintiffs nor WECO have alleged whether plaintiffs submitted that final accounting statement to WECO, in compliance with paragraph 9.01(c).

It is apparent to the Court that the Agreement not only gave plaintiffs the means to police WECO's production of the purchased wells in the month before the effective date, through the provision of WECO's records and the ability to challenge the production representations for 24 months after the Closing, but that the Agreement also required plaintiffs to examine those production

---

[4] Paragraph 9.01(c) of the Agreement provides,

> On or before sixty days after the Closing Date, a final accounting statement will be prepared by Buyer, subject to verification by Seller, based on actual income and expenses between the Effective Time and the Closing Date. On or before 30 days after receipt of the Statement, Buyer or Seller, as the case may be, shall pay to the other such sums as may be found to be due in the final accounting.

representations by mandating that a final accounting statement be prepared by plaintiffs. Plaintiffs' apparent failure to follow up on the obligations and rights granted to them in the Agreement they negotiated has created the situation for which plaintiffs now come before the Court, invoking its equitable aid. The Court declines to grant to plaintiffs the equitable relief of a constructive trust, an accounting or the disgorgement of unjust enrichment in order to rescue plaintiffs from their own inaction. Accordingly, the Court will grant WECO's motion for summary judgment on this issue.

V. Rule 11 Sanctions.

In its motion for summary judgment, filed March 11, 1994, WECO asks the Court to sanction plaintiffs pursuant to Fed.R.Civ.P. 11 concerning plaintiffs' amended complaint filed December 16, 1993. WECO contends that plaintiffs knew their claims were time-barred at the time they filed this action. WECO seeks "reasonable and necessary" attorney fees it expended in defending the present action, which it characterizes as "frivolous." Defendant's Brief in Support of Motion for Summary Judgement, p. 17.

When faced with a "serious" Rule 11 motion, the Court must make findings or give an explanation for its denial of the motion in sufficient detail so that the parties are assured that the Court's decision "was the product of thoughtful deliberation" and to give emphasis to the deterrent effect of its ruling. Griffen v. City of Oklahoma City, 3 F.2d 336, 340 (10th Cir. 1993). The 1993 amendments to Rule 11 make imposition of sanctions for a Rule 11

violation discretionary rather than mandatory. Knipe v. Skinner, 19 F.3d 72, 78 (2nd Cir.1994). Rule 11 sanctions should be imposed with caution. Id.

However, in this instance the Court notes a procedural bar to defendant's request under Rule 11 as amended.[5] It is does not appear that defendant complied with the 21-day "safe harbor" provision of Rule 11(c)(1)(A). That is, a motion for sanctions separate from other motions was not preliminarily served upon plaintiffs prior to its filing in this Court, so that plaintiffs would have the opportunity to withdraw or correct the challenged contentions. A letter dated December 15, 1993 was sent from defense counsel to plaintiffs' counsel, warning that sanctions would be sought if an amended complaint were filed (Exhibit 3 to Defendant's motion for summary judgment & supporting brief). Such a letter does not comply the provisions of Rule 11. Accordingly, the request for sanctions is not properly before the Court. In any event, the Court views the issue raised by defendant's sanction request, that plaintiffs' claims were clearly time-barred, as sufficiently disputable as to not merit sanctions. Rule 11(c)(1)(B) permits the Court to raise possible sanctionable conduct on its own motion. The Court is concerned about

---

[5]The 1993 amendments to the Federal Rules of Civil Procedure, effective December 1, 1993, govern "all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Order of the Supreme Court of the United States Adopting and Amending Rules, April 22, 1993; see also Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 644 n.56 (5th Cir.1994). The Court therefore applies the amended version of Rule 11 to the present case.

plaintiffs' allegations of "control" and "special circumstances" in order to cast WECO in a fiduciary role during the negotiation and execution of the Agreement. However, the Court concludes plaintiffs' conduct does not rise to the level that Rule 11(c)(1)(B) is implicated; plaintiffs' counsel should carefully scrutinize any future filings made before this Court.

Conclusion

The Court hereby **GRANTS** defendant WECO's motion for summary judgment on all causes of action claimed in plaintiffs' first amended complaint.

IT IS SO ORDERED this 14 day of December, 1994.

Terry C Kern

TERRY C. KERN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 14 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DEA D. WILSON,

Plaintiff,

vs.

AMERICAN NATIONAL CAN COMPANY, and LGC, INC., (Formerly LIBERTY GLASS COMPANY),

Defendants.

Case No. 94-C-925-BU

ENTERED ON DOCKET
DATE 12-14-94

ORDER

This matter comes before the Court upon the Motion to Remand to State Court filed by Plaintiff, Dea D. Wilson. Defendant, American National Can, has responded to the motion and Defendant LGC, Inc. has not. Upon review of the parties' submissions and the applicable case law, the Court makes its determination.

This case was originally filed in the District Court in and for Creek County, Oklahoma. In her Amended Petition filed September 9, 1994, Plaintiff alleged two claims against Defendants; one for wrongful discharge in violation of the Oklahoma workers' compensation laws, Okla. Stat. tit. 85, § 5, 6 and 7, and one for wrongful discharge in violation of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157 and 158. Defendants filed a Notice of Removal of a Civil Action on September 30, 1994. In the notice of removal, Defendants claimed that the Court had subject matter jurisdiction over Plaintiff's second claim by virtue of 28 U.S.C. § 1331; that the Court could exercise supplemental jurisdiction

17

over Plaintiff's first claim under 28 U.S.C. § 1367; and that removal was proper under 28 U.S.C. § 1441(a).

In its motion to remand, Plaintiff contends that removal was improper for two reasons. First, Plaintiff contends that removal was improper under 28 U.S.C. § 1446 because Plaintiff did not receive the notice of removal until thirty-two (32) days after Plaintiff filed the Amended Petition. Second, Plaintiff contends that removal is improper under 28 U.S.C. § 1441(a) because federal question jurisdiction does not exist since Plaintiff's claim for wrongful discharge in violation of the NLRA arises under state law rather than federal law. If the Court disagrees with Plaintiff's assessment of her claim, Plaintiff specifically requests the Court to grant her leave to amend her complaint to clarify that her claim arises under state law.

Defendant, in response, contends that removal was proper because the notice of removal was filed within the 30-day period prescribed in 28 U.S.C. § 1446(b) and the notice of removal was timely delivered to Plaintiff as required by 28 U.S.C. § 1446(d). Defendant also contends that removal is proper under 28 U.S.C. § 1441(a) because count II of Plaintiff's complaint falls within the scope of section 7 and section 8 of the NLRA and is preempted by the NLRA. Because Plaintiff's claim is preempted, Defendant contends that such claim arises under federal law. Consequently, federal question jurisdiction exists and removal is proper under 28 U.S.C. §1441(a).

The Court finds that Defendant timely filed the notice of removal. Section 1446(b) provides that the notice of removal must be filed within thirty (30) days after receipt by defendant of a copy of the initial pleading setting forth the claim for relief upon which such action is based. In the instant case, Defendant received service of the Summons and the Amended Petition (which added Defendant as a party) on September 14, 1994. Consequently, the notice of removal was filed within the 30-day time period set forth in § 1446(b).

The Court rejects Plaintiff's contention that removal was improper because she did not receive the notice of removal until thirty-two (32) days after the Amended Petition was filed. Section 1446(b) does not require the defendant to provide the plaintiff with written notice of the removal within the 30-day time period. Section 1446(d) only provides that adverse parties are to be given written notice promptly after the filing of the notice of removal. In this case, Defendant mailed a copy of the notice of removal on the date it was filed. Although Plaintiff did not receive the mailed copy due to an error in the address and had to have a copy hand-delivered, the Court concludes that the 11 days between the filing of the notice of removal and her receipt of the hand-delivered copy does not make removal improper.

Turning to Plaintiff's second argument that removal is improper because federal question jurisdiction does not exist, the Court notes that the presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule,"

which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). Under the well-pleaded complaint rule, the plaintiff is the master of its claim and it may avoid federal jurisdiction by exclusive reliance on state law. Id. Further, it is settled that a case may not be removed on the basis of a federal law defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint and even if both parties concede that the federal defense is the only question truly at issue. Caterpillar, 482 U.S. at 393, 107 S.Ct. at 2430.

In this case, the Court finds that Plaintiff's claim in count II of her complaint is based solely on a state law theory of wrongful discharge. It is clear that Defendants removed this case based upon their defense that count II of Plaintiff's complaint is preempted by the NLRA. Under the well-pleaded complaint rule, however, such defense does not provide grounds for removal.

An independent corollary does exist to the well-pleaded complaint known as the "complete preemption" doctrine, pursuant to which the Supreme Court has determined that the preemptive force of a statute is so extraordinary that it converts an ordinary state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Caterpillar, 482 U.S. at 393. Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from

its inception, a federal claim, and therefore arises under federal law. Id. One example of the complete preemption doctrine is a case arising under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, which gives district courts jurisdiction over disputes involving collective bargaining agreements and authorizes the courts to fashion a body of federal common law for the enforcement of such agreements. Id.

Defendant does not claim that Plaintiff's claim is preempted by section 301, however. Rather, it claims that Plaintiff's claim is preempted by section 7 and section 8 of the NLRA. Section 7 provides that employees shall have the right to form, join, or assist a labor organization. 29 U.S.C. § 157. Section 8(a)(3) provides that it is an unfair labor practice for an employer to discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization. Unlike cases arising under section 301, section 7 and section 8 do not confer original federal court jurisdiction over actions within their scope. United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus., Local No. 57 v. Bechtel Power Corp., 834 F.2d 884, 886 (10th Cir. 1987), cert. denied, 486 U.S. 1055 (1988). Instead, actions under section 7 and section 8 of the NLRA are committed in the first instance to the National Labor Relations Board. Id.; Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1397 (9th Cir. 1988).

Because section 7 and section 8 do not confer original federal court jurisdiction and because only state court actions which could

originally have been filed in federal court may be removed by a defendant, see, Caterpillar, 482 U.S. at 392, the Court finds that removal by Defendants in this case was improper and that remand is required pursuant to 28 U.S.C. § 1447(c).

Accordingly, the Court GRANTS Plaintiff's Motion to Remand to State Court (Docket No. 10). The Clerk of the Court is directed to mail a certified copy of this Order to the Clerk of the District Court in and for Creek County, Oklahoma. In light of the Court granting Plaintiff's motion, the Court declares MOOT Defendant American National Can's Motion to Dismiss Count II (Docket No. 5), Plaintiff's Motion for Leave to Amend Complaint (Docket No. 8) and Plaintiff's Motion to Dismiss Improper Party, Co-Defendant LGC, Inc. Without Prejudice (Docket No. 12).

ENTERED this 13 day of December, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT W. APPERSON;
JANE S. APPERSON;
STATE OF OKLAHOMA ex rel. COMMISSIONERS OF THE LAND OFFICE;
FIRST NATIONAL BANK AND TRUST COMPANY OF VINITA, Vinita, Oklahoma;
COUNTY TREASURER, Craig County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Craig County, Oklahoma,

Defendants.

DEC 14 1994

FILED

DEC 13 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. **94-C-752-B**

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of Dec., 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, **County Treasurer, Craig County, Oklahoma**, and **Board of County Commissioners, Craig County, Oklahoma**, appear by Clint Ward, Assistant District Attorney, Craig County, Oklahoma; the Defendant, **State of Oklahoma ex rel. Commissioners of the Land Office**, appears by its attorney Nancy Holsted; the Defendant, **First National Bank and Trust Company of Vinita, Vinita, Oklahoma**, appears not, having previously filed its Disclaimer; and the Defendants, **Robert W. Apperson and Jane S. Apperson**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Robert W. Apperson**, was served with Summons and Complaint on October 18, 1994; that the Defendant, **Jane S. Apperson**, was served with Summons and Complaint on October 18, 1994; that the Defendant, **State of Oklahoma ex rel. Commissioners of the Land Office**, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee, on August 4, 1994; that the Defendant, **First National Bank and Trust Company of Vinita, Vinita, Oklahoma**, filed an appearance through its attorney Thomas J. McGeady on August 17, 1994; that the Defendant, **County Treasurer, Craig County, Oklahoma**, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee, on August 4, 1994; and that the Defendant, **Board of County Commissioners, Craig County, Oklahoma**, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee, on August 4, 1994.

It appears that the Defendants, **County Treasurer, Craig County, Oklahoma**, and **Board of County Commissioners, Craig County, Oklahoma**, filed their Answer and Cross-Petition on August 10, 1994; that the Defendant, **State of Oklahoma ex rel. Commissioners of the Land Office**, filed its Answer and Cross-Petition on August 17, 1994; that the Defendant, **First National Bank and Trust Company of Vinita, Vinita, Oklahoma**, filed its Disclaimer of Interest on August 17, 1994; and that the Defendants, **Robert W. Apperson and Jane S. Apperson**, have failed

to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 20, 1991, Robert W. Apperson and Jane S. Apperson filed their voluntary petition in bankruptcy in Chapter 12 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-04150-W. An Order Converting Case to Case Under Chapter 7 was filed on February 21, 1992. Debtors were discharged of all dischargeable debts on June 22, 1992. Subsequently, Case No. 91-04150-W, United States Bankruptcy Court for the Northern District of Oklahoma, was closed on January 25, 1994.

The Court further finds that this is a suit based upon certain promissory notes and for foreclosure of mortgages securing said promissory notes upon the following described real property located in Craig County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **The West Half of the Northwest Quarter of Section 21, Township 29 North, Range 19 East, and containing 80 acres, more of less, in Craig County, State of Oklahoma, according to the United States Government Survey thereof.**

The Court further finds that on April 28, 1975, the Defendants, Robert W. Apperson and Jane S. Apperson, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in the amount of $9,400.00, payable in yearly installments, with interest thereon at the rate of 5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Robert W.

Apperson and Jane S. Apperson, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated April 28, 1975, covering the above-described property, situated in the State of Oklahoma, Craig County. This mortgage was recorded on April 28, 1975, in Book 287, Page 174, in the records of Craig County, Oklahoma.

The Court further finds that on July 26, 1977, the Defendants, Robert W. Apperson and Jane S. Apperson, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory notes in the amounts of $25,000.00 and $2,990.00, payable in yearly installments, with interest thereon at the rate of 5 percent per annum.

The Court further finds that as security for the payment of the above-described notes, the Defendants, Robert W. Apperson and Jane S. Apperson, executed and delivered to the United States of America, acting through the Farmers Home Administration, a real estate mortgage dated July 26, 1977, covering the above-described property, situated in the State of Oklahoma, Craig County. This mortgage was recorded on July 26, 1977, in Book 298, Page 485, in the records of Craig County, Oklahoma.

The Court further finds that the Defendants, **Robert W. Apperson and Jane S. Apperson**, made default under the terms of the aforesaid notes and mortgages by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Robert W.**

Apperson and Jane S. Apperson, are indebted to the Plaintiff in the principal sum of $33,046.36, plus accrued interest in the amount of $5,553.08 as of June 16, 1994, plus interest accruing thereafter at the rate of 5 percent per annum or $4.5269 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $36.50 ($28.50 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **County Treasurer, Craig County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $135.77, plus penalties and interest, for the year 1993. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Commissioners of the Land Office**, has a lien on the property which is the subject matter of this action in the amount of $5,996.42 plus interest at the rate of 7.5 percent per annum until paid, plus costs and a reasonable attorney fee up to a maximum of 10 percent of the outstanding debt with interest by virtue of a real estate mortgage recorded on October 30, 1974, in Book 285, Page 16 in the records of Craig County, Oklahoma. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **First National Bank and Trust Company of Vinita, Vinita, Oklahoma**, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, **Board of County Commissioners, Craig County, Oklahoma**, claims no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting through the Farmers Home Administration, have and recover judgment **in rem** against the Defendants, **Robert W. Apperson and Jane S. Apperson**, in the principal sum of $33,046.36, plus accrued interest in the amount of $5,553.08 as of June 16, 1994, plus interest accruing thereafter at the rate of 5 percent per annum or $4.5269 per day until judgment, plus interest thereafter at the current legal rate of 6.48 percent per annum until paid, plus the costs of this action in the amount of $36.50 ($28.50 fees for service of Summons and Complaint, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Craig County, Oklahoma**, have and recover judgment in the amount of $135.77, plus penalties and interest, for ad valorem taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel. Commissioners of the Land Office**, have and recover judgment in the amount of $5,996.42 plus interest at the rate of 7.5 percent per annum until paid, plus

costs and a reasonable attorney fee up to a maximum of 10 percent of the outstanding debt with interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **First National Bank and Trust Company of Vinita, Vinita, Oklahoma** and **Board of County Commissioners, Craig County, Oklahoma**, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Robert W. Apperson and Jane S. Apperson**, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Craig County, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Commissioners of the Land Office;

Fourth:
In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

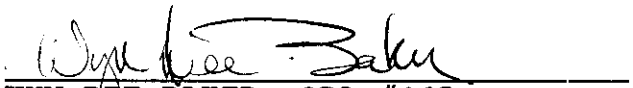
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

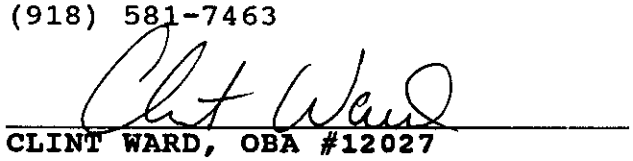
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



WYN DEE BAKER, OBA #465
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



CLINT WARD, OBA #12027
Assistant District Attorney
301 West Canadian Avenue
Vinita, OK 74301
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Craig County, Oklahoma

NANCY HOLSTED, OBA #11868
P.O. Box 26910
Oklahoma City, Oklahoma 73126
(405) 843-9962
Attorney for Defendant,
State of Oklahoma ex rel.
Commissioners of the Land Office

Judgment of Foreclosure
Civil Action No. 94-C-752-B

WDB:css

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 12-14-94

GERALD SPYBUCK, JR.,
Petitioner,
vs.
RON CHAMPION,
Respondent.

No. 94-C-1103-BU

FILED
DEC 13 1994
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF TRANSFER

Before the court are Petitioner's motion for leave to proceed in forma pauperis and application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Oklahoma County, Oklahoma, which is located within the territorial jurisdiction of the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district. **ACCORDINGLY, IT IS HEREBY ORDERED:**

(1) That Petitioner's motion for leave to proceed in forma pauperis be **granted**; and

(2) That Petitioner's application for a writ of habeas corpus be **transferred** to the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

IT IS SO ORDERED this 13 day of December, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

United States District Court)
Northern District of Oklahoma) SS
I hereby certify that the foregoing is a true copy of the original on file in this Court.
Richard M. Lawrence, Clerk
By _____ Deputy

4

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 14 1994

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

JOYCE J. BURLIN,

Plaintiff,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

92-C-478-W

ORDER REMANDING FOR SUPPLEMENTAL HEARING

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge, which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that plaintiff is not disabled within the meaning of the Social Security Act.[1]

In the case at bar, the ALJ made his decision at the fourth step of the sequential

[1] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

evaluation process.[2] He found that claimant had the residual functional capacity to perform work-related activities, except for work involving those aspects of work over and above those set forth for the full range of medium exertional activity. He found that claimant's past relevant work as an assembly worker did not require the performance of work-related activities precluded by these limitations. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) That the ALJ's decision that claimant could perform her past work is not supported by substantial evidence.

(2) That the ALJ erred in basing his decision largely on a consultative examination and post-hearing report, which amounted to a denial of claimant's due process right to cross-examine the medical advisor.

(3) That the ALJ erred in presenting a narrow and misleading hypothetical question to the vocational expert.

It is well settled that the claimant bears the burden of proving his disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

---

[2] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

The medical records show claimant was hospitalized on December 5, 1987, because she was running around the house naked, painting the walls with lipstick, and making grandiose comments regarding having special powers from God (TR 186). When she was discharged on January 11, 1988, Dr. Lawrence Trombka noted that her medication was monitored and adjusted during the stay and that she was finally placed on Mellaril (TR 182). She did not have any abnormal manifestations or drowsiness during the last week of hospitalization (TR 182).

She was referred to outpatient treatment at the Cherokee Nation Mental Health Service and began treatment there on February 25, 1988 (TR 268). The social worker noted that she was alert and oriented and did not have any problems other than some blocking experienced when talking (TR 268). She was tense, agitated, talking rapidly, and constantly moving when she was seen on March 4, 1988 (TR 266), but she was doing much better on March 15, 1988, when her medication was adjusted properly (TR 265).

The records from the Cherokee Nation Mental Health Service show that she continued to take her medication through May 11, 1990 (TR 250-265). Dr. Trombka authorized refills of plaintiff's medication, but did not conduct extensive psychiatric examinations of plaintiff (TR 203-20, 250-64). The comments of those treating her consistently show that she was doing well and her mental condition was stable with treatment of supportive therapy and Triavil and Lithium medication (TR 207-08, 210, 212, 218, 219, 250-61, 264).

On November 9, 1990, Dr. Trombka noted: "have attorney send release of info & what info he needs in report." (TR 250). On January 31, 1991, he wrote a three-sentence

letter to plaintiff's attorney, saying: "Joyce Burlin suffers from bipolar affective disorder which is currently being treated with Lithium. Her impairment is sufficient to keep her from gainful employment...." (TR 231). There is no explanation for his comment that claimant's impairment was sufficient to keep her from gainful employment in the progress records of that time period (TR 250).

Claimant saw two psychiatrists for independent evaluations. Dr. Thomas Goodman examined her on February 20, 1990. Dr. Goodman noted that she was only taking Lithium, 1150 mgs. per day. She told him her hallucinations had, for the most part, left, she felt calmer, and she only occasionally had racing thoughts (TR 195). She told him she has trouble sleeping and mostly "rests" during the day (TR 195). Her mental status examination revealed that she was alert, pleasant, and cooperative, slightly anxious, understood the questions asked, communicated well, followed directions, increased her activity slightly but had no flight of ideas or pressure of speech, spoke logically, had no hallucinations, was clear in her senses, and was oriented to time, place, and person (TR 196). She could recall all objects she was told to memorize, correctly spell "WORLD" backwards, compute the number of nickels in $1.35, and name three out of the last four presidents (TR 196). She was able to interpret proverbial phrases and compare unlike objects (TR 196).

Dr. Goodman concluded that claimant was able to remember, think, use judgment, and reason (TR 196). He noted that plaintiff's bipolar affective disorder, manic type, single episode, was partially in remission (TR 196). The doctor noted that plaintiff continued to complain of moderate symptoms and he concluded that, while she might not be stable

enough to return to work, she should be re-evaluated in 6 to 12 months, as she had "a good prognosis" suggesting "a return to a productive occupational life" (TR 197). Later records showed after this examination that she remained stable and did not have mood swings (TR 250-54).

When Dr. Minor Gordon examined plaintiff on May 28, 1991, her chief complaint was that she got tingling in her arms and legs and had headaches when she got "stressed out" (TR 270). He found she was tense, but had an appropriate range of mood, appropriate manner and attitude, and coherent and organized thought processes (TR 270). She denied having hallucinations, delusions, suicidal thoughts, or other problems of perception, and her immediate retention and recall and short and long term memory were all considered adequate (TR 270). Her I.Q. scores were 82, 75, and 78 (TR 271).

Dr. Gordon noted that claimant had been diagnosed as suffering from manic depression and had done well on lithium therapy (TR 271). She had not required additional hospitalizations, was active on good days, and was "vague" as to what she did on bad days (TR 271). Dr. Gordon further concluded that it would be good therapy for claimant to "perform some type of routine or repetitive task on a regular basis" (TR 271). He said she should return to work "so she can generate the self-respect inherent in working" (TR 271).

In an assessment of claimant's ability to do work-related mental activities, Dr. Gordon found that claimant had a "good" ability to maintain personal appearance, interact with supervisors, co-workers, and the public, deal with work stresses, follow work rules, function independently and use her judgment, and maintain attention and concentration

(TR 273-274). He concluded that claimant had a "fair" to "good" ability to demonstrate reliability, relate predictably in social situations, and behave in an emotionally stable manner (TR 274). Finally, Dr. Gordon opined that plaintiff had a "good" ability to understand, remember and perform simple job instructions and a "fair" ability to understand, remember and perform detailed job instructions, but a "poor/no" ability to perform complex job instructions (TR 274).

At the hearing before the ALJ, claimant stated that she performed her past work as an assembly worker for 12 years before she quit after having a hysterectomy in April 1987 (TR 62-63). She went on to describe the anxiety and odd behavior that led to her hospitalization and lithium therapy (TR 64-68). Claimant said that her symptoms return when her lithium level is too low (TR 69). She said that she used to have her lithium level checked every two months, but that she now has it checked every six months because it has been staying in the therapeutic range during the previous 12 months (TR 69-70). She said that her daily activities included making coffee, talking to her mother by telephone, doing housework and cooking (TR 73-74). She also said that she read, visited with her friends at her house, and drove around town (TR 75-76). She noted that she chased her cat and worked in the garden (TR 80).

This evidence supports the ALJ's conclusion that claimant's testimony was frank and sincere, but credible only to the extent that it is reconciled with her ability to perform the full range of medium exertional activity, including her past work as an assembly worker. Her past job was a low-stress occupation, involved only simple tasks, and did not involve intense interaction with others, according to the vocational expert (TR 90-92). A

psychological disorder is not disabling *per se*, and a claimant must demonstrate the severity of such an impairment with objective clinical findings. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982); Sitar v. Schweiker, 671 F.2d 19, 20 (1st Cir. 1982).

While the medical evidence supports a conclusion of claimant's moderate psychological impairment resulting in anxiety and occasional highstrung behavior, her doctors nowhere restrict her daily activities and actually conclude work will benefit her.

The court concludes that error occurred when the ALJ based his decision in large part on a post-hearing report of Dr. Minor Gordon, Ph.D. (TR 32), because plaintiff's counsel did not have the opportunity to cross-examine the doctor. The hearing at which claimant testified and was represented by counsel occurred on November 19, 1990. Subsequent to the hearing, on May 28, 1991, the claimant was sent to Dr. Minor, who completed a detailed medical evaluation report (TR 270-271) and also a "Medical Assessment of Ability To Do Work-Related Activities (Mental)" (TR 273-275). The ALJ forwarded the reports to claimant's attorney and advised her that she could submit written comments regarding the reports or submit additional evidence (TR 269, 276). The attorney did not respond, and upon considering all the evidence in the record, the ALJ determined that claimant was not disabled.

In Richardson v. Perales, 402 U.S. at 402, the Supreme Court addressed the issue of due process requirements in the context of physicians' reports in social security disability claim hearings. The Court approved admission of such reports and stated that they could be used as "substantial evidence" even if the reports were hearsay "when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself

with the opportunity for cross-examination of the physician." Id. at 402. In Richardson, the reports had been issued before the hearing and the physicians who prepared the reports had examined the claimant.

In this case the report was issued post-hearing. The practice of allowing post-hearing reports is not uncommon. The ALJ frequently will not close the record after the hearing, either to order a post-hearing examination of the claimant or to allow the claimant to introduce post-hearing evidence in support of his claim. See Wallace v. Bowen, 869 F.2d 187, 191-92 (3d Cir. 1988); Hudson v. Heckler, 755 F.2d 781, 783 (11th Cir. 1985), cert. granted, Bowen v. Hudson, 488 U.S. 980 (1988), aff'd on other grounds, Sullivan v. Hudson, 490 U.S. 877 (1989). The factual distinction of whether the report was issued before or after the hearing is not crucial to this decision. Rather, the focus is on the requirements of due process.

In Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983), the court held that the ALJ's use of a post-hearing report constituted a denial of the due process and statutory requirements of 42 U.S.C. § 405 (b)(1), because the claimant was not given the opportunity to cross-examine the witness or rebut the report. See also, Fulton v. Heckler, 760 F.2d 1052, 1054 (10th Cir. 1985). In Allison, the Tenth Circuit also found that the use of such reports exceeded the Secretary's statutory authority, because under the statute the Secretary is mandated to determine a claimant's disability on the basis of evidence adduced at the hearing. 711 F.2d at 147.

While the ALJ gave claimant the opportunity to rebut the reports and to submit additional evidence, the weight of the case law has found that due process is not satisfied

when a claimant only has the opportunity to comment on a post-hearing report and not cross-examine the author. Tanner v. Secretary of HHS, 932 F.2d 1110, 1112-13 (5th Cir. 1991); Demenech v. Secretary of HHS, 913 F.2d 882, 885 (11th Cir. 1990); Wallace, 869 F.2d at 191-92; Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984). In these cases, the claimants were given the opportunity to object to the post-hearing evidence and offer additional evidence by way of report, interrogatory, or affidavit. However, in each instance, the courts found a violation of due process because the right of cross-examination was denied. In Wallace, the court criticized the form notice sent by the ALJ to the claimant's attorney, saying that it was insufficient to give notice of available due process rights[3].

The Wallace court notably rejected the argument that an opportunity to comment on and present additional evidence is sufficient under the statute, especially in cases where the evidence is medical, saying "effective cross-examination could reveal what evidence the

---

[3]The form used was identical to the form used here. (TR 276). It provided:

> If you wish to submit (1) written comments concerning the evidence received, (2) a written statement as to the facts and law in the case, or (3) additional evidence not previously supplied, I will carefully consider the material. Please send it to me at the above address within 10 days from the date of this letter.
>
> If I have not heard from you within the 10 day period, I will assume you have no comments or statements to make and that you have no further evidence to submit. The case will still receive the same careful consideration. A decision will be issued based on the additional evidence and other evidence of record.

In footnote number 4 of the opinion, the court said:

> We note with some concern that the Secretary's form notice to Wallace did not even give notice that Wallace had the opportunity to request a supplementary hearing on the post-hearing additional evidence as well as the right to subpoena witnesses, notwithstanding the Secretary's own regulation on "Opportunity to review and comment on evidence obtained or developed by us after the hearing," which provides, inter alia, "If you believe that it is necessary to have further opportunity for a hearing with respect to the additional evidence, a supplementary hearing may be scheduled at your request." 20 C.F.R. § 404.916(f) (1987).

physician considered or failed to consider in formulating his or her conclusions, how firmly the physician holds to those conclusions, and whether there are any qualifications to the physician's conclusions." 869 F.2d at 192.

The court in Tanner, 932 F.2d at 1113, concluded that plaintiff explicitly objected to the premises upon which the expert's report was based and asked that those premises be revised so that they might more accurately relate Tanner's true work experience. In so doing, he laid the predicate to assert the right to cross-examine the expert, failing a decision by the ALJ to recast the questions. When the ALJ denied the objection, he deprived plaintiff of the timely opportunity to assert, specifically, the right of cross-examination. Under such circumstances, the court refused to infer a waiver from the failure to make an express demand for cross-examination. "The fact that, in the case of reports received after the close of an administrative hearing, a waiver of the right to cross-examine 'must be clearly expressed or strongly implied from the circumstances' only bolsters this holding." Id. (citing Lonzollo v. Weinberger, 534 F.2d 712, 714 (7th Cir. 1976)).

The Secretary argues that the claimant waived cross-examination of Dr. Gordon by not objecting to the use of his report. The Eighth and Eleventh Circuits have held that a total failure to respond to post-hearing evidence when given the opportunity results in waiver. Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir. 1990); Hudson, 755 F.2d at 783. However, the Tenth Circuit remains silent on the issue of waiver.

There is nothing in the record to indicate that claimant's attorney responded to the ALJ's letter inviting a response to the addition of Dr. Gordon's report. In her letter to the

Appeals Council, claimant's counsel raised many issues, but notably failed to object to the consideration of Dr. Gordon's report at the next administrative level. The question is therefore squarely presented: Does the failure to object to the post-hearing evidence result in waiver of due process rights to cross-examination in the Tenth Circuit? In the context of these facts, the answer must be "no." Plaintiff was represented by counsel, but the notice letter from the ALJ to her (TR 276) did not mention the right to ask for a supplemental hearing to cross-examine the doctor who wrote the post-hearing report. Waiver could only be implied if there was explicit notice of such a right and a failure to take advantage of it. United States v. Hudson, 14 F.3d 536, 539 (10th Cir. 1994). Plaintiff never expressed a desire to forego confronting Dr. Gordon. The court agrees with the conclusion in Lidy v. Sullivan, 911 F.3d 1075, 1077 (5th Cir. 1990), that "'an opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled.'" (citing Wallace, 869 F.2d at 192).

There is no merit to plaintiff's final contention that the ALJ did not ask the vocational expert a proper hypothetical question which included all of claimant's restrictions, as required by the court in Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The vocational expert found that claimant's past work as an assembly packer was "medium work with 25 to 50 pounds of lifting, requires reaching, handling, fingering, and feeling, and is semiskilled" (TR 90). The ALJ then asked:

> [L]et's assume that the Administrative Law Judge were to find that the claimant is a 41-year-old individual who has a tenth grade education with limited ability to read, write, and use numbers. Let's further assume that the Administrative Law Judge were to find that the claimant has in general the physical capacity to perform a full range of medium, light,

> and/or sedentary -- I want you to consider all three levels. There are no physical restrictions as such. The -- let's assume further that the Administrative Law Judge were to find that the -- certain -- to find that there are functional or psychiatric limitations based upon a diagnosis of effective [sic] disorder and bipolar disorder-- disorder in partial remission. In that regard, the claimant would be able to perform simple tasks only, could not tolerate active involvement with the public, could relate adequately to coworkers and supervisors if the contact is minimal and superficial, also the claimant would need to function in a low-stress setting, low-stress type occupation. Assume further that as the claimant endeavored to function from the medium, light, and/or sedentary level, that she would have symptomatology from a variety of sources, but that despite such symptoms, the claimant would be able to remain attentive to conversations and respond appropriately thereto in a meaningful manner, that she would be able to process or handle matters presented for processing or handling as part of the work situation. Further, let's assume that the claimant does take medication for relief of symptomatology, but that with utilization of the medication and considering it along with her symptomatology and the other proposed restrictions, she would be -- she would not be precluded from functioning at the medium, light, and/or sedentary level and that she would remain reasonably alert to perform functions presented, presented at a work setting. Assuming all the foregoing, could the claimant return to any of her past relevant work either as she has described it or as it is customarily performed? (TR 90-92).

The vocational expert responded that claimant could perform assembly work. The vocational expert concluded that, if claimant's testimony at the hearing was assumed to be fully credible, she would be unable to do any work because of her claim that she could not handle any stress whatsoever (TR 93).

The case is remanded for a supplemental hearing to allow plaintiff's counsel to cross-examine Dr. Gordon and present rebuttal evidence.

Dated this 13th day of December, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:burlin.ord

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 13 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STEVEN WILLIAMS,)
)
Plaintiff,)
)
vs.) No. 92-C-963-C
)
R. MICHAEL CODY, et al)
)
Defendants.)

ORDER

Now before the Court is Petitioner's motion for a sixty-day extension of time to respond to the November 8, 1994 order.

After carefully reviewing the record in this case, the Court concludes that Petitioner's request is excessive. In the event Petitioner cannot in good faith complete his response by the deadline set out in this order, he should file a second motion for an extension of time.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion for an extension of time (doc. #9) is **granted in part** and Petitioner shall file a response to the November 8, 1994 order (doc. #8) no later than thirty (30) days from the date of filing of this order.

SO ORDERED THIS 13th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CLIFFORD EUGENE CAMPBELL,)
)
Petitioner,)
)
vs.) No. 92-C-945-C
)
RON CHAMPION, et al.,)
)
Respondents.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case and Petitioner's pro se letter received on November 18, 1994, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. In the event Petitioner wishes to raise in this habeas action non-delay issues, Petitioner's request is denied without prejudice. This procedure will permit Petitioner to have sufficient time to explore fully his potential habeas claims, exhaust state remedies where necessary, and avoid any Rule 9 problems.[1] See McKlesky v. Zant, 499 U.S. 467 (1991).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without prejudice** to his filing of a separate pro se

[1]Rule 9 of the Rules Governing Section 2254 Cases in the District Court.

action to pursue any other constitutional claims he might have.

(2) Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEREK DEWAYNE BURGER,

Petitioner,

vs.

JACK COWLEY, et al.,

Respondents.

No. 92-C-970-C

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES HARDY NORTHCROSS,)
)
Petitioner,)
)
vs.) No. 92-C-924-C
)
RON CHAMPION, et al.,)
)
Respondents.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY DEAN GRAHAM,

Petitioner,

vs. No. 92-C-969-C

R. MICHAEL CODY, et al.,

Respondents.

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIONEL DEWAYNE HOLLAND,

Petitioner,

vs.

No. 92-C-982-C

JACK COWLEY, et al.,

Respondents.

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROSCOE HENRY TILLEY, JR.,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 92-C-989-C

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK, Senior Judge
UNITED STATES DISTRICT COURT

18

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY LEE BAILEY,)
)
Petitioner,)
)
vs.) No. 92-C-983-C
)
RON CHAMPION, et al.,)
)
Respondents.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 12th day of December, 1994.

H. DALE COOK
UNITED STATES DISTRICT COURT

DCV/dmt

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CRAIG HOSPITAL, a Colorado non-profit organization, and LESTER BUTT,	)	
Plaintiffs,	)	
vs.	)	***CASE NO.: 94-C-97-K***
RAY BAYS, individually d/b/a RAY BAYS & ASSOCIATES, and JEROME D. GONSHOR, JR., individually,	)	
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, CRAIG HOSPITAL and LESTER BUTT, and the Defendants, RAY BAYS, individually, d/b/a RAY BAYS & ASSOCIATES and JEROME D. GONSHOR JR., by and through their respective counsel, and pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure hereby stipulate to the dismissal of the above-captioned matter with prejudice to its refiling, with each party to bear its own respective costs and attorney fees.

R. Tom Hillis, OBA # 12338
Shane Egan, OBA # 15545
Boone, Smith, Davis, Hurst and Dickman
5000 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103-4215
(918) 587-0000
Attorney for Craig Hospital and Lester Butt

Steve Tolson, OBA # 12965
3601 North Classen, Suite 203
Oklahoma City, Oklahoma 73118
(405) 524-2222
Attorney for Jerome D. Gonshor Jr.

David C. Vorwald, OBA # 11719
Ray Bays & Associates
6444 South Western
Oklahoma City, Oklahoma 73139
(405) 632-4494
Attorney for Ray Bays, individually and d/b/a Ray Bays & Associates

26

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HELEN GREY TRIPPET; HELEN GREY TRIPPET, Custodian for Leslie S. Murphy and Mark Murphy; ROBERT S. TRIPPET, Guardian of Virginia Trippet; MARY SUSAN TRIPPET; CONSTANCE S. TRIPPET; FLO HEDLEY NORVELL and RUSSEL SIMPSON NORVELL, Executors of the Estate of Alberta Simpson Matteson; HELEN GREY TRIPPET, Custodian for Scott Trippet Poland,	)Civil Action No. 92-C-192-E
Plaintiffs,	
vs.	
TRI TEXAS, INC. (a Florida Corporation); CHARLES S. CHRISTOPHER; THE HOME-STAKE OIL AND GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION; JARRELL B. ORMAND; PAINE WEBBER INCORPORATED,	
Defendants.	

JUDGMENT

In accordance with the Court's Findings of Fact and Conclusions of Law filed on March 31, 1994, the Court hereby enters judgment in the following particulars:

1. (a) *Rescission*: Judgment is rendered in favor of plaintiffs and against defendant Tri Texas, Inc. a/k/a EnvirOmint Holdings, Inc. as follows: (a) the HSRC Escrow Agreement (*Pl. Trial Ex. 1*), HSRC Exchange Agreement (*Pl. Trial Ex. 3*), HSOG Escrow Agreement (*Pl. Trial Ex. 5*), HSOG Exchange Agreement (*Pl. Trial Ex. 7*) and the

224

Collateral Agreement (*Pl. Trial Ex. 9*) are hereby ordered rescinded and plaintiffs are decreed the rightful owners of the common stock of Home-Stake Oil and Gas Company (HSOG) and Home-Stake Royalty Corporation (HSRC) at issue herein and held as follows free of any claim by any defendant:

1) *HSRC*

Helen Grey Trippet	5,463 shares
Helen Grey Trippet, Custodian for Scott Trippet Poland	25 shares
Helen Grey Trippet, Custodian for Leslie S. Murphy	13 shares
Helen Grey Trippet, Custodian for Mark Murphy	13 shares
Mary Susan Trippet	75 shares
Constance S. Trippet	125 shares
Robert S. Trippet, Custodian for Virginia Trippet	13 shares
Flo Hedley Norvell and Russell Simpson Norvell, Executors of the Estate of Alberta Simpson	6,050 shares
	11,777 shares

2) *HSOG*

Helen Grey Trippet	9,840 shares
Helen Grey Trippet, Custodian for Leslie S. Murphy	90 shares
Helen Grey Trippet, Custodian for Mark Murphy	90 shares

Mary Susan Trippet	160 shares
Constance S. Trippet	740 shares
Flo Hedley Norvell and Russell Simpson Norvell, Executors of the Estate of Alberta Simpson	9,100 shares
	20,020 shares

(b) Plaintiffs are further awarded and deemed owners of all accrued dividends on the HSOG & HSRC stock being held by Home-Stake Oil and Gas Company and Home-Stake Royalty Corp.

(c) Plaintiffs are directed to return to Tri-Texas all consideration received in the transactions between the parties.

2. *Promissory Note and Guaranty*: Judgment is entered in favor of plaintiff Helen Grey Trippet and against Tri Texas, Inc. a/k/a EnvirOmint Holdings, Inc. on her claims on the promissory note obligation (*Pl. Trial Ex. 223*) and against Charles S. Christopher on his guaranty obligation jointly and severally in the amount of $193,645.81 plus accrued interest in the amount of $65,224.71 through April 3, 1994, for a total amount of $258,870.52 plus post judgment interest under 28 U.S.C. §1961 at the rate of 4.51% per annum or $31.98 per diem until paid.

3. *Surety*: The Court hereby enters judgment in favor of plaintiff Helen Grey Trippet and against Tri Texas, Inc. a/k/a EnvirOmint Holdings, Inc. (as maker) and Charles S. Christopher (as Guarantor), jointly and severally, on her claim for surety related to the promissory note in the amount of $156,354.19 plus accrued interest in the amount of $15,960.45 through April 3, 1994, for a total amount of $172,314.64 plus post judgment interest on the total amount pursuant to 28 U.S.C. §1961 at a rate of 4.51% per annum or

$21.29 per diem thereafter until paid.

4. *Fraud*: The Court hereby enters judgment in favor of defendants and against plaintiffs as to plaintiffs' fraud claims.

5. *Counterclaims*: Judgment is entered in favor of plaintiffs and against defendants on all of defendants' counterclaims.

6. Attorneys fees and costs may be awarded to plaintiffs as prevailing parties upon proper and timely application.

7. Pursuant to Order of the Court dated January 3, 1994 Jarrell B. Ormand, Escrow Agent, is ordered to surrender all HSOG and HSRC stock certificates to plaintiffs ten (10) days after entry of this Judgment.

8. Further, Home-Stake Royalty Corporation and Home-Stake Oil and Gas Company are ordered to pay over all accrued dividends being held by the companies to plaintiffs ten (10) days after entry of this Judgment.

9. All relief not expressly granted herein is denied.

Dated this 12th day of ~~November~~ December. 1994.

JAMES O. ELLISON
U.S. DISTRICT COURT JUDGE

602-2.430:sh

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNNY DAVIS,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 92-C-308-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and thus mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. The Court also concludes that Petitioner's non-delay issues (alleged in his original petition) should be dismissed without prejudice at this time. This will permit Petitioner to have sufficient time to explore fully his potential habeas claims, exhaust state remedies where necessary, and avoid any Rule 9 problems.[1] See McKlesky v. Zant, 499 U.S. 467 (1991).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without**

[1]Rule 9 of the Rules Governing Section 2254 Cases in the District Court.

16

prejudice to his filing of a separate pro se action to pursue any other constitutional claims he might have;

(2) Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 12th day of December, 1994.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARTHUR PAUL BLACKMON,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 92-C-150-B

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and thus mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. The Court also concludes that Petitioner's non-delay issues (alleged in his original petition) should be dismissed without prejudice at this time. This will permit Petitioner to have sufficient time to explore fully his potential habeas claims, exhaust state remedies where necessary, and avoid any Rule 9 problems.[1] See McKlesky v. Zant, 499 U.S. 467 (1991).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without prejudice** to his filing of a separate pro se

[1]Rule 9 of the Rules Governing Section 2254 Cases in the District Court.

16

action to pursue any other constitutional claims he might have;

(2) Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 12th day of December, 1994.

James O. Ellison

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHANE BOGGS,)
)
Petitioner,)
)
vs.) No. 92-C-148-E
)
RON CHAMPION, et al.,)
)
Respondents.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and thus mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. The Court also concludes that Petitioner's non-delay issues (alleged in his original petition) should be dismissed without prejudice at this time. This will permit Petitioner to have sufficient time to explore fully his potential habeas claims, exhaust state remedies where necessary, and avoid any Rule 9 problems.[1] See McKlesky v. Zant, 499 U.S. 467 (1991).

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without prejudice** to his filing of a separate pro se

[1]Rule 9 of the Rules Governing Section 2254 Cases in the District Court.

11

action to pursue any other constitutional claims he might have;

(2) Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 12th day of December, 1994.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 12 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DONALD BERGERON, on behalf of Galdys R. Day, an incompetent person,

Plaintiff,

vs.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

Case No. 93-C-480-E

O R D E R

The Court notes that this matter has been stayed pending service of Defendants since September 7, 1993. On October 19, 1994 Plaintiff was directed to obtain service upon all Defendants, or show good cause for failure to obtain service, within 30 days. Plaintiff has not responded to that Order.

Pursuant to Fed.R.Civ.P. 4(m), Service must be made within 120 days of filing the Complaint. Otherwise, the Court, on its own initiative, after notice to Plaintiff, may dismiss the action, or direct that service be made within a specified time. Because Plaintiff failed to obtain service on the Defendants or show good cause for the failure, Plaintiff's claim is dismissed.

IT IS SO ORDERED THIS 12th DAY OF ~~OCTOBER~~ December, 1994.

JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD DWAYNE COOPER,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 92-C-0717-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN THOMAS BYRD,

Petitioner,

vs. No. 92-C-0716-E

RON CHAMPION,

Respondent.

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GALEN RODNEY WOOTEN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-0561-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDREW MICHAEL WEST,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

No. 92-C-0542-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BRIAN SCOTT DANIELS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 92-C-0515-E
	)	
RON CHAMPION,	)	
	)	
Respondent.	)	

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEPHEN STERLING THOMAS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-0512-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH D. LARKINS,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 92-C-128-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**. Petitioner's pro se motion for summary judgment (doc. #8) is **denied**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 12 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY BOYD WHIPKEY,)
)
Petitioner,)
)
vs.) No. 92-C-0184-E
)
RON CHAMPION,)
)
Respondent.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

James O. Ellison

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEVIN DON COLE,

Petitioner,

vs. No. 92-C-0371-E

RON CHAMPION,

Respondent.

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER EUGENE WALTERS,

Petitioner,

vs.

DAN REYNOLDS,

Respondent.

No. 92-C-0406-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 12 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL DEE FARMER,

Petitioner,

vs.

MICHAEL CODY,

Respondent.

No. 91-C-0487-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

23

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL ROGERS, JR.,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 91-C-0987-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOEL PAYNE VANSCOY,

Petitioner,

vs.

STEPHEN KAISER,

Respondent.

No. 91-C-0989-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

EDWARD TEICHMAN,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-0012-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID WALTER BOWERS,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-0077-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH D. LARKINS,

Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

No. 92-C-128-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**. Petitioner's pro se motion for summary judgment (doc. #8) is **denied**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 12 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LAUREN JACKSON HANKINS, JR.,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

No. 92-C-0444-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACKIE LYNN ADAIR,)
)
Petitioner,)
)
vs.) No. 92-C-0461-E
)
RON CHAMPION,)
)
Respondent.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY PHILLIP CROW,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 92-C-0933-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICKIE CRISP,

Petitioner,

vs.

WARDEN CODY,

Respondent.

No. 92-C-1037-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID WAYNE RICHARD,)
)
Petitioner,)
)
vs.) No. 93-C-0218-E
)
WARDEN CODY,)
)
Respondent.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 12 1994
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

GLENN DAVID MCGUIRE,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

No. 92-C-1023-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

18

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL PRATER,)
)
Petitioner,)
)
vs.) No. 92-C-1115-E
)
MICHAEL CODY,)
)
Respondent.)

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

QUNION R. LEIGH,

Petitioner,

vs.

L. L. YOUNG,

Respondent.

No. 92-C-1150-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 12-13-94

14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES JOHN FOX,

Petitioner,

vs. No. 93-C-0074-E

JACK COWLEY,

Respondent.

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted.**

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STEVEN BANKS,

Petitioner,

vs.

DAN REYNOLDS, et al,

Respondents.

No. 93-C-0135-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and has, thus, mooted the delay issue.

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted. Accordingly, the Court **dismisses** Petitioner's petition for a writ of habeas corpus **without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have. Petitioner's motion to dismiss without prejudice is **granted**.

SO ORDERED THIS 9th day of December, 1994.

JAMES O. ELLISON
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12-13-94

16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHERRI McDOUGLE, Individually, and THE ESTATE OF RONALD J. McDOUGLE, Deceased, Sherri McDougle, Executrix,

Plaintiffs,

vs.

METROPOLITAN LIFE INSURANCE COMPANY and AMERICAN AIRLINES, INC. and "John Doe Insurance Co.,"

Defendants.

Case No. 94-C-565-E

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs, Sherri McDougle, Individually, and The Estate of Ronald J. McDougle, Deceased, Sherri McDougle, Executrix, and the Defendants, Metropolitan Life Insurance Company and American Airlines, Inc., by and through their respective attorneys of record, and jointly dismiss this cause of action with prejudice to the filing of any further cause of action for the reason that the issues have been fully compromised and settled.

C. W. DAIMON JACOBS & ASSOCIATES, P.C.

By: _____
C. W. Daimon Jacobs
Attorney for Plaintiff

GABLE & GOTWALS, INC.

By: _____
Renée DeMoss, OBA #10779

2000 Fourth National Bank Building
Tulsa, Oklahoma 74119
(918) 582-9201
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 9 - 1994

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DOLLAR SYSTEMS, INC., a Delaware corporation,

Plaintiff,

vs.

INTERNATIONAL FRANCHISING SERVICES, LTD. a/k/a INTERNATIONAL FRANCHISING SERVICES, INC., SIGMA FOUR INTERNATIONAL MARKETING, INC., ROBERTO GALOPPI and CECILIA GALOPPI,

Defendant.

Case No. 94-C-33-BU

ENTERED ON DOCKET

DATE 12-12-94

ORDER

This matter comes before the Court upon the Joint Motion for Dismissal With Prejudice filed on December 6, 1994. Upon due consideration, the Court **GRANTS** the motion and **DISMISSES WITH PREJUDICE** all claims of Plaintiff, Dollar Systems, Inc., against Defendant, Cecilia Galoppi only, with each party to bear its own costs and attorney's fees.

ENTERED this 9th day of December, 1994.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

47

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EVELYN MAXINE DYE,)
)
Plaintiff,)
)
vs.) No. 93-C-973-B
)
UNITED STATES FIDELITY &)
GUARANTY COMPANY,)
)
Defendant.)

ORDER OF DISMISSAL WITH PREJUDICE AS TO
DEFENDANT, U.S. FIDELITY & GUARANTY COMPANY

In accordance with Stipulation of Dismissal between Plaintiff and Defendant, U.S. FIDELITY & GUARANTY COMPANY, and by reason of settlement of all issues pending between them, it is herewith ordered that the said action be and is hereby dismissed with prejudice as to Defendant, U.S. FIDELITY & GUARANTY COMPANY. This Order does not affect Plaintiff's remaining claim against Defendant, KFC.

Dated this 9th day of Dec., 1994.

S/ THOMAS R. BRETT
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELBERT BELVEAL, an individual, and NORMA BELVEAL, an individual, Plaintiffs,	)	
v.	)	No. 94-C-1007B
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois corporation, Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 9 day of Dec., 1994, it appearing to the court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT
United States District Judge

194\620\stip.dlb\PTB

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MERCEDES O. WYATT,

Plaintiff,

v.

SAM'S WHOLESALE CLUB,
a trademark of WAL-MART STORES, INC.,

Defendant.

Case No. 93-C-826-W

JUDGMENT

This action came on before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS THEREFORE ORDERED that judgment is entered in favor of the defendant, Sam's Wholesale Club, and against plaintiff, Mercedes O. Wyatt.

Dated this 8th day of December, 1994.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:Wyatt.judg

30

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID PAUL HAMMER,

Petitioner,

vs.

DAN REYNOLDS,

Respondents.

No. 92-C-596-E

ORDER

Now before the Court is Petitioner's motion to dismiss without prejudice his habeas corpus claim based on the issue of appellate delay. Petitioner, through appointed counsel Curtis Biram, alleges that the Oklahoma Court of Criminal Appeals has affirmed Petitioner's state appeal and thus mooted the delay issue.[1]

After reviewing the record in this case, the Court concludes that Petitioner's motion to dismiss his appellate delay claim without prejudice should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's petition for a writ of habeas corpus is **dismissed without prejudice** to his filing of a separate pro se action to pursue any other constitutional claims he might have;

(2) Petitioner's motion to dismiss without prejudice is

[1]Although Petitioner originally alleged only a civil rights action under 42 U.S.C. § 1983, the supplemental and amended complaint filed by appointed counsel David Booth in the Harris consolidated cases preserved Petitioner's habeas delay issue.

27

granted.

SO ORDERED THIS 7th day of December, 1994.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT